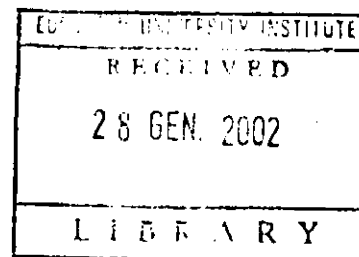


EUROPEAN UNIVERSITY INSTITUTE

Department of Law



**European Social Policies: A Legal Review at the Eve of Enlargement.**

**A Hungarian Point of View**

Orsolya Farkas

Thesis submitted with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

The Examining Board:

Prof. Silvana Sciarra, EUI (supervisor)

Prof. Bruno De Witte, EUI

Prof. Csilla Kollonay Lehoczky, Central European University, Budapest

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EUI, Florence 2002











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## PREFACE

The conceptualisation of the social dimension of the European Community, and Union, has proven to be a complex challenge. Beyond the central elements such as free movement of workers, equal treatment, workplace health and safety, the boundaries are uncertain. The situation is further complicated by the fact that though most issues of labour law and social policy primarily fall within the responsibility of the Member States, there has always been a common vision of a European social model based on mutually accepted values and principles.

Having this vision in mind, distilled from the rhetoric of the Treaties and from political commitments, the research was based on a learning process. This process opened up a critical approach towards the initial assumption which described European integration around a social model *per se* founded on solidarity and welfare. By juxtaposing various opinions and explanations, both from the side of Community institutions and scholars, a more articulated view was acquired on the value choices and reasons which fundamentally influenced the development of Community labour law and social policies.

The most appropriate method seemed to be the historical reconstruction of the evolution of those institutions, processes and motivations which form the core elements of the European social dimension. A project to analyse the whole area would have been too ambitious: the research focuses on those aspects which then led to the new Title on employment in the Amsterdam Treaty. This method might be considered as a descriptive one, but it proved to be a useful way to understand and to make visible how Community reasoning and value choices have changed and new issues have emerged throughout the Community's history.

The first difficulty to be faced was that although the terminology used at the Community level corresponds to that applied at the national level, the situations and

conflicts it is rooted in are very different. At the Community level, the social pressure which gave birth to national labour and social legislation was hardly present. Community level interventions have always been strictly linked to market oriented considerations. The arena where social and market values could interact was the labour market, thus all Community initiatives were employment related, even if later on they gained an independent regulatory agenda.

Guidance is given to the analysis by the changing relation of market and social values during the Community's development. The founding fathers considered workers solely as the human factor of the production process and free movement of workers was simply one of the four economic freedoms framing the fundamental values of the European Economic Community. This perception was corrected at the beginning of the 1970s, when it became apparent that economic growth requires a Community social policy to ensure that the benefits of growth are adequately diffused and to compensate those who had to contribute to the costs of closer economic integration. Although the Treaty was not amended and the lack of specific legal basis persisted, a solution was found in the form of policy initiatives granting a particular weight to the Commission.

The overwhelming influence of economic values in European integration was re-evaluated at the time of the Single European Act, when decision-makers recognised that an effective social policy is a necessary support for a successful economic policy. During this phase it was no longer sufficient to compensate the losers of market integration, but redistributive efforts were directed to regions and societal groups with the aim of placing them in a position to be able to participate fully in the internal market programme.

In the mid-1990s it was once more emphasised that labour standards and competitiveness mutually influence each other. On the one hand competitiveness is to be seen as a basic instrument to raise the standard of living, create jobs and eradicate poverty. On the other hand, labour standards constitute a condition of economic growth: only a highly skilled, motivated, adaptable workforce can ensure the competitiveness of the European economy.

The Amsterdam Treaty responded to these requirements by incorporating into the Rome Treaty a new Title on employment. Yet it would be premature to pronounce a firm judgement on the new institutions and procedures, first of all because they do not provide for a static solution but for a dynamic process. The Amsterdam Treaty consolidated those policies, tendencies and soft law measures which have already been present in Community guidance. The maturation of the process is still in progress, employment is the subject of a complex multi-actor, multi-level governance. Numerous questions are still open, but the Amsterdam Treaty conferred a proper legal basis on European employment policy, for which it has striven since workers gained an importance beyond their role as an economic factor.

The Charter of Fundamental Rights of the European Union was adopted at the Nice European Council at the end of 2000. Although this innovative text mainly contains principles and their interpretation opens up discussions, by its mainstreaming effect it can counterbalance the highly flexible nature of employment policies. It is also a visible set of those rights which characterise the European integration process; thus it can serve as a basic reference for the candidate Eastern and Central European countries.

A very critical approach has dominated this historical overview of Community social policies. Yet changing the context of the examination, the achievements which have so far been considered limited, gain a different value. A candidate country, in the present case Hungary, has to face serious challenges to be able to take up the obligations of membership. The analysis points not only to the technical efforts, such as the transposition of the *acquis* or the functioning of the social dialogue and the labour market, but to the human conditions as well, which are hardly taken into consideration when the readiness of a country is tested. These conclusions render the long and detailed examination of Community social policies valid: it was the only way to understand, from a Central-European intellectual background, the nature and content of the requirements an applicant country has to fulfil, in the field under scrutiny.

Beyond the excellent conditions provided by the EUI Library in providing access to complete and up to date documentation, my learning process was further enriched by the experience gained during the in-service training at the Employment DG of the European Commission. This traineeship supplemented the academic research by giving an insight into the problems which emerge during implementation. Another invaluable experience was offered by the European Studies Programme of the Law Faculty of Szeged University. The process of lecturing rendered the research more practice-oriented, and gave me the opportunity to have continuous feedback on the application of my research findings.

I would like to express my thanks first of all to Prof. Silvana Sciarra for her patient and professional guidance and above all for her confidence in me. Thanks must go to Prof. Bruno De Witte (EUI), Prof. Csilla Kollonay Lehoczky (CEU, Budapest) and Prof. Manfred Weiss (University of Frankfurt) for their kindness in being members of the evaluation committee. It is impossible to count all those whose advice and support contributed to the completion of this work. I also would like to thank my fellow researchers at the Institute, of whom I had friendship and company, with whom I had the opportunity to work and to share the everyday life of the Institute. A special thank goes to my parents and to all of them who in various ways kept me going on. Mention must be made of Prof. Maurizio Pedrazza Gorlero (University of Verone), Prof. Luigi Sbolci (now University of Florence), Prof. Lajos Pintér, and Giovanna Ligugnana.

## **Chapter I**

### **THE FOUNDATION OF THE SOCIAL DIMENSION**

This part of the work aims to provide a clear point of departure for further analysis. The journey through the history of the Community to reconstruct the social dimension must begin at the origin of the Community in order to provide all necessary elements for subsequent development. This process involves the formulation of a definition of the subject matter and the elaboration of the methodology. This task is not an easy one, because it is necessary to define a continuously changing phenomenon.

The work is carried out along the following lines: in order to illustrate the huge scope of the subject matter, an attempt is made to outline the field of scrutiny, and to sketch out the issues to be discussed. Then the provisions of the Rome Treaty relating to social issues will be examined. Here the main interest is to search for the values and arguments of the founding fathers, to properly understand and analyse these provisions. In so doing, the driving values of the Community in relation to social issues can be identified and the crucial question can be answered whether the Community had an independent, autonomous social objective or whether it had any such objective at all.

In anticipation of the research findings, a common understanding can be stated as follows: The main purpose of the EEC was to establish a common market first of all through the full realisation of the four economic freedoms. In this respect social provisions could serve two purposes: the establishment of a common labour market and the elaboration of measures which, although they are not necessarily and directly 'social' in nature, also ensure the proper functioning of the common market.

At the same time it has to be added that although the Rome Treaty contained provisions which can be seen as the seeds of the nascent social dimension, the picture

today differs to a large extent from the one that could be sketched out on the basis of the original Treaty. In order to leave open a space for solutions to evolve recourse was had to an open model and methodology in the area of social policy. The model and the method are built on the complexity of approaches and on the multiplicity of sources. The complexity of approaches is needed because of the strong interaction between history, law, politics and economics and because of their overlapping boundaries. The multiplicity of sources is provided by the activism of the Community institutions, Member States, international organisations, social partners and other actors.

#### An unfortunate case: search for definition

At the beginning of an enquiry the subject matter must first be defined. In the present case there is an enormous difficulty with this definition and this difficulty is reflected in the rather eclectic nature of this chapter. The frequently used phrase, "the social dimension of the European Community" is in fact a very vague and unprecise expression. If one wants to discover and analyse this dimension, some clarification is necessary in order to create a common understanding. Referring to other authors only serves to confirm our insecurity. Sciarra states that: "Labour lawyers approaching European social policies have often found themselves wondering about the object of their research and investigating its boundaries. Like strangers moving around in an unknown country, they often gaze at their new surroundings with an air of curiosity, as well as of mystification."<sup>1</sup> Some others go further and generalise saying that the root problem in European integration is the lack of a consolidated European identity,<sup>2</sup> or that the jurisprudence cannot come to our assistance either, since Community law is still at an embryonic stage, and is full of discontinuities and *lacune*.<sup>3</sup>

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<sup>1</sup> Sciarra, Silvana: *European Social Policies and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law*, Vol. IV. Book 1. p.307.

<sup>2</sup> Lo Faro, Antonio: *EC Social Policy and 1993: The Dark Side of the European Integration?* (1992) 14 *Comparative Labor Law Journal* p.4.

<sup>3</sup> Mancini, Federico G.: *L'incidenza del diritto comunitario sul diritto del lavoro degli stati membri* (1989) 29 *Rivista di Diritto Europeo* p.12.



Notwithstanding these discouraging statements respect of the social dimension or more generally with regard to European integration, all labour lawyers educated within the European cultural tradition share a very similar notion of fundamental values and convictions regarding the social dimension and of the European social model we want to preserve. Most scholars try to articulate a definition and are tempted to circumscribe their subject of scrutiny through definitions which are tailored and segmented according to the actual subject of research. It is worthwhile to recall some of these definitions since they can contribute to the formulation of a common core of the notion in question. Mückenberger and Deakin spell out a definition of the European social order as follows: "one which increases the requirements of equality, individual freedom and welfare within a network of collective security and participation."<sup>4</sup> Teague recognises that whilst the term 'Social Europe' continues to elude precise definition, it is taken to refer to the two key institutions that underpinned post-war economic life: the welfare state and collective bargaining, backed up by comprehensive labour market regulation.<sup>5</sup> The White Paper on Social Policy underlines that there are a number of shared values which form the basis of the European social model. These include democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity.<sup>6</sup> The Conclusions of the Vienna European Council held at the end of 1998 take a different path: "Employment is a top priority of the European Union. It is the best way of providing real opportunity for people and combating poverty and exclusion effectively, thereby serving as the basis for the European social model."<sup>7</sup>

The above cited attempts to define the European social model all contain core elements in common, but none of them gives the impression of completeness and comprehensiveness. What they do reflect are the uncertain boundaries of law in relation to the world of economics and politics. Thus the main channel of investigation and the methodology have to be chosen with an extreme care. One way forward may be to suggest

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<sup>4</sup> Mückenberger, Ulrich and Deakin, Simon: *From deregulation to a European floor of rights: Labour law, flexibilisation and the European single market* (1989) ZIAS p.197.

<sup>5</sup> Teague, Paul: *Monetary Union and Social Europe* (1998) 8 Journal of European Social Policy p.118.

<sup>6</sup> European Social Policy. A Way Forward for the Union (COM(94)333) Introduction, point 3.

<sup>7</sup> Vienna European Council, Presidency Conclusions, 11 and 12 December 1998; point 26.

a negative definition, that is to say to define the European social model by means of distinguishing it from other systems or models.

In our search for appropriate channels to explore the social dimension of European integration, a distinction which exists in national labour law can be of assistance. Although this distinction will not define entirely the content of the EC dimension, it will limit it by excluding certain disciplines. The basic conflict which gave birth to national labour laws runs as follows: At the very centre of the capitalist system lies, an essentially coercive and highly asymmetrical relationship which is given the label of contract, the parties to which are necessarily hostile to one another.<sup>8</sup> At the same time, EC legislation was not motivated by this basic problem; EC legislation does not arise from a critique of the above-mentioned unequal relationship; its *raison d'être*, thus its scope of action, is completely different and its labour law is only marginal. To achieve the fundamental aim of the Community, that is to realise a common market, the EC's labour legislation contains two sets of rules: those directly serving the establishment of a common labour market, and those calculated to define a Community social policy so that the common labour market, but also and primarily the Common Market itself, can function properly.<sup>9</sup>

Remaining with the distinction between the subject matter dealt with by Community and national labour laws, it also has to be noted that although national labour and social legislation emerged much earlier than EC law, the synthesis of legislative and other norms into national laws with a coherent intellectual framework was a much more recent development, which can be located in the second half of the century.<sup>10</sup> This was the

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<sup>8</sup> Poggi, Gianfranco: *Calvinismo e spirito del capitalismo* (1984) p.46. Mancini also quotes Poggi and adds: legislatures of Europe have invariably sought to modify the phenomenon that Poggi so neatly encapsulated: in other words they have always operated with a view to ensuring that workers enjoy the greatest possible freedom when it comes to concluding contracts of employment, to tempering the coercion and asymmetry inherent in the employment relationship and to causing the innate mutual hostility between employee and employer to yield to a rational assessment of the costs and benefits deriving from it. (Mancini, Federico G.: *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.1.) See also: Kahn-Freund, who defined the principal purpose of labour law as follows: "... is to regulate, to support and to restrain the power of management and the power of organised labour." (Davies, P. and Freedland, M. (eds): *Kahn-Freund's Labour and the Law* (1983) p.15.

<sup>9</sup> Pocar, Fausto: *Diritto comunitario del lavoro* (1983) in: *Enciclopedia giuridica del lavoro*, diretta da Mazzoni, G. p.6.

<sup>10</sup> Bercusson, Brian: *European Labour Law* (1996) p.8.

time when social pressure was strong enough to bring about social legislation.<sup>11</sup> In the context of European integration, there was simply no space for such social pressure, as the underlying assumption behind the Treaty was that if one could remove all artificial obstacles to the free movement of labour, goods and capital, this would in time ensure the optimal allocation of resources throughout the Community, the optimum rate of economic growth, and thus an optimum social system. Thus the need to write specific social provisions into the Treaty was not evident.<sup>12</sup> Soon this belief was justified by reality: the remarkable economic success of the Member States, a sustained low level of unemployment and the growth of indigenous welfare benefits systems and rising living standards did not call for social intervention either.<sup>13</sup>

To further complicate the situation we have to bear in mind the specific nature of the Community in as much as it is partial and incomplete; incomplete not only with respect to the institutional configuration and democratic legitimacy, but also with regard to the competences attributed to it and its fundamental functions.<sup>14</sup> Limiting this notion to the social context the sociologist Streeck argues that European social policy necessarily has to be articulated on two levels, on the supranational and on the national level. He states that: "European social policy is produced as the combined outcome of joint intergovernmental decisions at the supranational level and the fragmented use of sovereignty vested in interdependent national political arenas." He explains why the national level of policy making is decisive: "[...] the nation states that created and continue to govern an integrated Europe have themselves long been highly developed welfare states that derive much of their domestic political legitimacy from their social policies. Contrary to what is sometimes suggested, this makes them less rather than more likely to agree to a supranational European welfare state, due to the manifold domestic

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<sup>11</sup> Jacobs, Antoine T.J.M. and Zeijen, Hans: *European Labour Law and Social Policy* (1993) p.129. The statement continues as follows: All social pressure in Europe is still at national level. National politicians are in continuous debates with national employers' representatives and trade unionists on changes desired in national labour law. Occasionally this debate is prompted by strikes or pressure methods from employers.

<sup>12</sup> Shanks, Michael: *The Social Policy of the European Communities* (1977) 14 Common Market Law Review p.375.

<sup>13</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy. Essays in Memory of Malcolm Mead* p.17.

<sup>14</sup> Treu, Tiziano: *Diritti sociali europei: dove siamo* (2000) 14 Lavoro e Diritto p.432.

interests that have over the years become attached to the national provision of social welfare."<sup>15</sup>

After the clarification made to separate the fundamental notions of national and Community levels, we have to add immediately that during the development process the two levels have become less and less distinct, and more and more interrelated. What is important to underline here, even if only in very generic terms, is the contribution of national systems. One can easily point to many examples of the specific symbiosis of Community and national laws due to the influence of highly developed and technically sophisticated national labour law systems. For example, the inclusion of art.119 in the Treaty was due to French insistence, or the Commission's proposals on workers' participation in company structures owe their inspiration to the German law on co-determination. The Danish tradition of basing labour law primarily on collective agreements rather than on legislation is also worth mentioning.<sup>16</sup> Barnard argues in a similar way that the shape of European social policy has been heavily influenced by the individual national systems. She identifies three main systems of legal regulation of industrial relations within the Union: the Roman-Germanic, the Anglo-Irish and the Nordic systems. Since the Union is numerically dominated by those Member States from highly regulated Roman-Germanic tradition, this has tended to provide the model for EC legislation on employment rights.<sup>17</sup>

Several arguments were put forward along these lines to guide the distinction between the territory of Community and of national labour laws and at the same time to draw attention to a specific interaction between these and other sources. We could also

<sup>15</sup> Streeck, Wolfgang: *Neo-Voluntarism: A New European Social Policy Regime* (1995) 1 *European Law Journal* pp.39-40.

<sup>16</sup> Bercusson, Brian: *European Labour Law* (1996) p.9-10.

<sup>17</sup> Barnard, Catherine: *EC Employment Law* (1995) pp.51-53. Sciarra goes one step further with her remark: "This mutual influence is still relevant in course of the cristallization of social rights which have not yet gained a solid body but they are in continuous transformation and redefinition. The 'new' European constitutional rights feed the 'old' rights already incorporated into national constitutions and contribute to their redefinition. The Commission through its programmatic activities has a very active task to promote this process." (Sciarra, Silvana: *Diritti sociali fondamentali* (1996) in: Baylos Grau, A; Caruso, B; D'Antona, M; Sciarra, S. (eds): *Dizionario di Diritto del Lavoro Comunitario* p.87; see also: Ruggeri, Antonio: *Nuovi diritti fondamentali e tecniche di positivizzazione* (1993) *Politica del Diritto* pp.190 and 193.)

observe that the realm of politics and of economics is inseparably connected to the notion of the social dimension. As Kahn-Freund points out: "... some provisions of the Treaty are simply general statements of policy or of legislative programs -blanks to be filled in accordance with the economic and political developments."<sup>18</sup> Although we still cannot completely define the notion of the social dimension these indispensable elements can serve as a compass.<sup>19</sup>

Therefore we have to choose the model and method very carefully and we need an open-ended concept built on the complexity of approaches and on the multiplicity of sources. As this research is based in EC law, the approach is primary legal, supplemented by a contextual approach taking into account historical and political circumstances.<sup>20</sup> The economic context has an outstanding importance. As we have seen, the social and labour legislation of the Community has been placed in this framework,<sup>21</sup> and their formulation and implementation have always responded to economic imperatives. The other main component of the model, the multiplicity of sources, is formulated by the following factors: on the one hand the legal instruments of the Community and the actions of its institutions; on the other hand the interaction with the external environment of the

<sup>18</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.297.

<sup>19</sup> We can add here some more expressions of this uncertainty. "As a concept, the social policy of the Community remains opaque and almost incapable of precise definition." (Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy. Essays in Memory of Malcolm Mead* p.4.). Bercusson has a similar view: "In terms of their content, the development of norms regarding labour during almost four decades of existence of the EC has been spasmodic, episodic and unsystematic." (Bercusson, Brian: *European Labour Law* (1996) p.7) Weatherill and Beaumont are somewhat confused: "The Community has always had an explicit commitment to social policy. Art.119 is simply the most precise of the provisions contained in this title, which comprised art.117-128 of the EEC Treaty." A few lines later they continue as follows: "Apart from art.119 the original provisions were largely aspirational and inexplicit." The question arises: How can a commitment be explicit if the provisions are aspirational and inexplicit? However, the statements reflect precisely the ambiguities of the Treaty concerning the weight of the social dimension. (Weatherill, Stephen and Beaumont, Paul: *EC Law. The Essential Guide to the Legal Workings of the European Community* (1995) p.636.). Barnard presents the subject matter in a similar way: "An element of ambiguity has always surrounded any discussion about the existence of a Community social policy. While the economic objectives of the Treaty of Rome have received a whole-hearted endorsement of the Member States, this has not always been true of the social dimension." (Barnard, Catherine: *EC Employment Law* (1995) p.53.)

<sup>20</sup> see among others: Bercusson, Brian: *European Labour Law* (1996)

<sup>21</sup> Davies puts it in a sharper way: "So long as a piece of Community labour legislation can be promoted only on the basis that it contributes to the integration of markets, Community law in this area will remain hobbled." (Davies, Paul: *The Emergence of European Labour Law* (1992) in: McCarthy, W. (ed): *Legal Intervention in Industrial Relations. Gains and Losses* p.347.)

Community, comprising of Member States, international organisations, social partners and other actors.<sup>22</sup>

This open-ended model based, on the one hand, on the original considerations and value judgements of the founding fathers and, on the other on the multiplicity of sources and complexity of approaches, is able to recognise the peculiarity that the boundaries of the social dimension are rather uncertain and even unstable.<sup>23</sup> The uncertainty arises from the fact that the social dimension has opaque confines with history, politics, sociology and law. The instability is brought about by the internal development of the subject matter, since the social dimension has always been the subject of enlargement and transformation.<sup>24</sup> Consequently the best solution is to make reference to the historical development to start our investigation of European labour and social law and policies. Throughout this historical analysis, various stages of this development can be identified and at each stage the content of social policy can be spelled out. This approach is appropriate to reconstruct the cornerstones of different stages and to illustrate the important changes.

#### An attempt to identify the intentions of the founding fathers. The Rome Treaty

The nucleus of our investigation in this section is to answer the question whether the Treaty contained a social objective *per se* and if it did what it was and under what

<sup>22</sup> Bercusson labels this multiplicity of sources as the internal and external dynamics of the EC labour law. (Bercusson, Brian: *European Labour Law* (1996) pp.13-14.)

<sup>23</sup> Mancini has a rather pragmatic statement which should be borne in mind: "Either we like or not, in fact, the conceptual categories elaborated by internationalists or constitutionalists give little help when the case is to explain the reality." (Mancini, Federico G.: *Il governo dei movimenti migratori in Europa: cooperazione o conflitto?* (1992) in: AA.VV.: *Il governo dei movimenti migratori in Europa: cooperazione o conflitto?* p.31.)

<sup>24</sup> With the passing of the time the situation has not become simpler, and we can find a variety of conceptualisations. E.g. there is a trend towards conceptualising labour law as a labour market regulation. (Vogel-Polsky, Eliane: *What Future is There for a Social Europe Following the Strasbourg Summit?* (1990) 19 *Industrial Law Journal*, p.72; or Roccoella, Massimo and Treu, Tiziano: *Diritto del Lavoro della Comunità Europea* (1995)). Another example can be found in the introduction of the concept of the Union's citizenship which includes the protection of social rights. These provisions represent a potentially exciting move towards the complete disassociation of EC law of persons from its economic focus in favour of a wider notion of the individual's position in the society. (Weatherill, Stephen and Beaumont, Paul: *EC Law. The Essential Guide to the Legal Workings of the European Community* (1995) p.544.) See also: Craig, Paul and De Búrca, Grainne: *EC Law -Text, Cases and Materials* (1995) pp.707-711.

limitations. The purpose of this examination is to clarify the meaning and content of the Treaty provisions relevant to our subject matter and to understand them at the eve of the foundation of the EEC, in 1957. In so doing the intention of the founding fathers with regard to social issues can be identified. The following articles are relevant to this exercise: art.2 and 3(c);(i); the free movement provisions, art.48-51; the social provisions, art.117-122; and the provisions establishing the European Social Fund, art.123-128.

Our starting point has to be art.2 which defines the task of the European Economic Community:

*The Community shall have its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated increase in the standard of living and closer relations between the States belonging to it.*

Among the objectives of the Community there is only one category which can correspond to social aims, all the others refer to economic ones. The vague notion of 'standard of living' begs the question whether this category can be identified as a proper social objective. The academic literature, generally speaking, accepts that raising the standard of living can be roughly identified with some kind of social aim. Weatherill and Beaumont, for example, describe art.2 as suggesting a core of common action even in the social sphere.<sup>25</sup> Daubler points out that "the Community is resolved to ensure not only economic but also social progress, which is to be reflected in a constant improvement of living and working conditions. Reference to this objective is also made in art.2."<sup>26</sup>

To assess the weight of this social objective, linked to living standards, some features of art.3 are worth recalling:

*For the purposes set out in art.2, the activities of the Community shall include, as provided in this Treaty...:*

<sup>25</sup> Weatherill, Stephen and Beaumont, Paul: *EC Law. The Essential Guide to the Legal Workings of the European Community* (1995) p. 615.

<sup>26</sup> Daubler, Wolfgang: *Instruments of EC Labour Law* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.153.

*(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;*

*(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;*

The Spaak Report emphasised that the removal of internal tariffs and import quotas is in itself not sufficient for the creation of a common market. Other measures are required, and among these special importance has to be attached to provisions designed to promote labour mobility and to those facilitating re-adaptation, so as to protect workers from the 'burdens and risks' attending progressive change. One of the aims of the Community must be the free circulation not only of goods and services, but also of the "factors of production themselves, that is of capital of men."<sup>27</sup> This statement clearly expresses the position of any social provision and in this context one can understand why labour is treated in a very similar way to services and capital. Mancini puts it in an even sharper way, focusing attention on the role of labour, thus his contribution should be quoted at length : "...the Treaty has only one real objective: the creation of a European market based on competition and characterised, on the one hand, by the liberalisation of trade between the Member States and, on the other, by the establishment of a common custom tariff *vis-a-vis* the rest of the world. It is obvious that labour -and employed labour, in particular- is inextricably involved in that objective. It is therefore logical that the Treaty and Community secondary legislation should be concerned with labour. But it is also logical that they should be concerned with it only to the extent of that involvement and, above all, in the light of the potential impact of workers' material and legal position on the attainment of this objective."<sup>28</sup> Other scholars also share this view; Nielsen and Szyszczak discuss art.2 as confirming that the raising of living standards and social progress were originally perceived as by-products of economic integration.<sup>29</sup> Lyon-Caen is more provocative; he argues that labour law was born as a law to organise fair

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<sup>27</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.298.

<sup>28</sup> Mancini, Federico G.: *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.2.

<sup>29</sup> Nielsen, Ruth and Szyszczak, Erika: *The Social Dimension of the European Community* (1991) p.17.



competition between enterprises, thus as complementary, not in a spirit different from competition.<sup>30</sup>

Summarising the confrontation between common market and social objectives, we can respond to the question whether the Community had an independent social objective at its foundation. The Community's social and labour legislation was intended to serve two related but distinct purposes: the removal of obstacles to migration of labour and the removal of what is called "distortion" of competition.<sup>31</sup> For a more detailed analysis three sets of rules have to be distinguished and examined: the free movement provisions, the social provisions and the provisions concerning the European Social Fund.

#### The free movement provisions

Art.48 provides for the following rights on the basis of the prohibition of discrimination on the grounds of nationality and with limitations justified on the grounds of public policy, public security or public health:

- (a) to accept offers of employment actually made;*
- (b) to move freely within the territory of Member States for this purpose;*
- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.*

Although freedom of movement and the right to equal treatment are themselves social rights, the original Community context subordinates them to economic objectives, to the establishment and well-functioning of the common market. The Spaak Report made

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<sup>30</sup> Lyon-Caen, Gérard: *L'infiltration du Droit du travail par le Droit de la concurrence* (1992) Droit Ouvrier p.313.

<sup>31</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.299.

clear that free movement of labour is necessary to allow workers to find available work, arguing that as demand for labour would increase where labour was the cheapest, wage rates would tend to rise and free circulation of labour would facilitate an equalisation in terms and conditions of competition.<sup>32</sup> Even if the social implications of the free movement provisions are taken into account, the economic considerations take precedence. While the free movement measures may have beneficial social consequences they are not, strictly speaking, instruments of social policy. Art.48-51 are intended to guarantee the free movement of workers by prohibiting discrimination on the grounds of nationality. Undoubtedly these provisions have created job opportunities and more security for trans-national workers but the overall effect has been extend equality of treatment for workers and those seeking employment rather than to enhance social conditions in general.<sup>33</sup> Streeck makes a sharper comment directly on social issues: What the Community was instead charged with by the Treaty of Rome was developing a *new kind of social policy*, one concerned with *market-making rather than market-correcting*, aimed at creating an integrated European labour market and enabling it to function efficiently, rather than correcting its outcomes in line with political standards of social justice.<sup>34</sup>

The free movement provisions, those devoted to human capital are divided into three chapters: art.48-51: Workers; art.52-58: Right of Establishment; art.59-66: Services. Steiner argues that the first chapter covers workers whereas the other two cover the self-employed. She expounds that the main difference between the two categories is that workers are not only under the direction of their employer, but they are dependent in economic terms as well, whereas the self-employed enjoy independence.<sup>35</sup> Bercusson doubts the independence of the self-employed. He raises the question of how far are they independent from their clients and customers.<sup>36</sup> But it is not this distinction which lies at

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<sup>32</sup> Spaak Report (1956) p.78.

<sup>33</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy. Essays in Memory of Malcolm Mead* pp.10-11.

<sup>34</sup> Streeck, Wolfgang: *Neo-Voluntarism: A New European Social Policy Regime* (1995) 1 *European Law Journal* p.40.

<sup>35</sup> Steiner, Josephine: *Textbook on EEC Law* (1988) p.144.

<sup>36</sup> Bercusson, Brian: *The Collective Labour Law of the European Union* (1995) 1 *European Law Journal* p.174.

the centre of our discussion. The most important aim was to establish common rules and principles applicable to the general phenomenon of migration within the Community. In this process, the European Court of Justice (ECJ) has played a very active role in correcting for the lack of proper Treaty provisions and precise guidance. Through its jurisprudence it has developed a nuanced structure of legal rules of far greater sophistication than might be suggested by the bare words of the Treaty.<sup>37</sup>

The Treaty provides no definition of 'worker' so the matter has fallen to the Court, giving it the opportunity to elaborate a proper concept applicable in the Community context. The Court has argued that benefits can be fully enjoyed only if the category of worker and the worker's employment relationship are defined in the Community sense. It is in fact evident that if the working relationship had to be defined on the basis of the norms of the various Member States we would have as many notions as there are national orders, with the high risk, in reality with certainty, of destroying the common labour market or reducing it to an empty formula.<sup>38</sup> This remark suggests to the need to recognise that Community sources are in the nature of uniform substantive law and they have a unifying capacity. The Court held that in order to determine the meaning of the terms "worker" and "activity as an employed person" it is appropriate to have recourse to the "generally recognised principles of interpretation", beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty.<sup>39</sup>

The Court defined the essential characteristics of a worker as follows: during a certain period of time the person performs services for and under the direction of another in return for remuneration.<sup>40</sup> In another case the Court enriched the definition further, to

<sup>37</sup> Weatherill, Stephen and Beaumont, Paul: *EC Law. The Essential Guide to the Legal Workings of the European Community* (1995) p.543; Giubboni, Stefano: *Libertà di circolazione e protezione sociale nell'Unione Europea* (1998) *Giornale di Diritto del Lavoro e di Relazioni Industriali*, No.77. p.83.

<sup>38</sup> Mancini, Federico G.: *L'incidenza del diritto comunitario sul diritto del lavoro degli Stati membri* (1989) 29 *Rivista di Diritto Europeo* p.13.

<sup>39</sup> By "generally recognised principles" the Court means the method which it applies when a concept is not defined in Community law: it derives the characteristic features of that concept from the fundamental rules governing it in the legal systems of the Member States. (Mancini, Federico G.: *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.4.)

<sup>40</sup> *Lawrie-Blum v Land Baden-Württemberg* (case 66/85) [1987] 3 CMLR 389.

include those, who are not considered in fact to be workers for various reasons such as illness, accident or unemployment, but who are capable of taking a job.<sup>41</sup> As a next step to widen the category, the issue of part time employment came on the agenda. In a number of different cases<sup>42</sup> the ECJ held that the fact that a person is employed only to a limited extent, such as part-time worker, does not affect his rights as a worker even if he relies on public funds for support because he earns less than the national minimum income. In the *Levin* case the Court declared that work involves "the pursuit of effective and genuine activities to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary".<sup>43</sup> This so called *Levin test* is satisfied even if the worker's income has to be topped up with supplementary state benefits.

Apart from defining the Community concept of worker, the Court's activism has further contributed to the full application of the free movement provisions. In the case of *Watson v Belmann*<sup>44</sup> a number of national authorities insisted that the wording of art.48 that the right ... (a) to accept offers actually made; (b) to move freely within the territory of Member States 'for this purpose' decisively meant the right to move freely existed only if there was an offer and only in order to accept it. In contrast, Advocate General Trabucchi rejected this narrow interpretation of art.48. He argued that in light of the Treaty objectives, that is the constitution of a free labour market, a citizen of a Member State is authorised to enter another Member State in order to seek employment.<sup>45</sup>

#### Establishing the common market: social security for migrant workers

Generally speaking, mobility of labour is not something which occurs automatically or naturally, it is mostly caused by constraints such as shortage of work. In

<sup>41</sup> Hoekstra (née Unger) v BBDA (case 75/63) [1964] ECR 177, [1964] CMLR 319.

<sup>42</sup> Levin v Staatssecretaris van Justitie (case 53/81) [1982] ECR 1035, [1982] 2 CMLR 454; Kempf v Staatssecretaris van Justitie (case 139/85) [1987] 1 CMLR 764.

<sup>43</sup> Levin v Staatssecretaris van Justitie (case 53/81) [1982] ECR 1035, [1982] 2 CMLR 454; para 17.

<sup>44</sup> Watson v Belmann (case 118/75) [1976] ECR 1185.

<sup>45</sup> Mancini, Federico G.: *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.5. and *L'incidenza del diritto comunitario sul diritto del lavoro degli Stati membri* (1989) 29 *Rivista di Diritto Europeo* p.14. On the contrary: Lyon-Caen, Gérard and Lyon-Caen, Antoine: *Droit social international et européen* (1993) p.193.

contrast, if a labour shortage exists, mobility has to be stimulated. This stimulation can occur in a negative and a positive way: namely by the abolition of obstacles hampering free movement of labour, or by giving incentives to geographical and occupational mobility. Paying closer consideration to the first case, two principal obstacles to the free movement of labour are discrimination based on nationality and the risk of losing those social security benefits which would be received under the Member State's system but which might be lost in case of taking up work in another Member State.

In order to remedy this problem a Regulation concerning the Social Security of Migrant Workers was quickly adopted after the foundation of the EEC.<sup>46</sup> Kahn-Freund argues that until 1959 the Regulation and the accompanying measures for implementation were not only the most important step taken by the Community in the fields of labour law and social security, but by far its most significant achievement altogether.<sup>47</sup> Although the measures were enacted in the form of a Regulation, they were based not on the concept of harmonisation, but on the more limited concept of co-ordination: this did not necessarily imply the creation of common minimum standards but rather a process of mutual recognition between different legal systems.<sup>48</sup> The main purpose was to avoid *lacunae* and overlaps between national systems and to ensure the aggregation and exportability of social security benefits for migrant workers. Although the question in hand was how to deal with the social consequences of the free movement of labour, the solution was limited to satisfying the requirements of the common market.

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<sup>46</sup> Regulation No 3/1958, OJ L 561 and for the implementation Regulation No.4/1958; OJ L 597.

<sup>47</sup> As a matter of fact even before 1957 a system of conventions existed among various states of Western Europe, which was designed to protect social security rights acquired by workers in one country and to make them transferable to another as well as to facilitate the payment of benefits abroad. Most of the conventions were concluded under the auspices of the Council of Europe. In 1957 a similar convention was signed by the Member States of the European Coal and Steel Community (ECSC) with the assistance of the International Labour Organisation (ILO). Then the ECSC Convention was transformed into an EEC Regulation, and the preparatory work for the Regulation to be issued by the Council of the EEC had, so to speak, been done before the Community itself had seen the light of day. This was therefore a unique situation in which a very comprehensive piece of Community legislation entered into force within a rather short time. (Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.321.)

<sup>48</sup> Deakin, Simon: *Integration through Law? The Law and Economics of European Social Policy* (1997) in: Addison, J.T. and Siebert, W.S. (eds): *Labour Markets in Europe: Issues of Harmonisation and Regulation* p.121.

The original Regulation of 1958 was revised and replaced by Regulation 1408/71 on the co-ordination of the social security systems<sup>49</sup> which is, albeit amended and updated from time to time, still in force. As the Regulation represents one of the main pillars of the measures which can give full effect to the free movement provisions, some fundamental principles should be highlighted. There is no need to analyse in detail the long and complicated Regulation, because the real key to its interpretation, as is very often the case in secondary EC legislation, can be found in the Preamble.<sup>50</sup> At this juncture the personal and material scope and the functional principles will be briefly recalled.

Regarding the personal scope of the Regulation the Preamble refers back to national legislation:

*Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons.*<sup>51</sup>

Generally speaking, the Regulation is applicable to everyone who is insured under any of the national systems irrespective of whether they are general or special schemes, contributory or not. At this point the limits of co-ordination in making the common market function can be clearly illustrated: For the interpretation of the free movement provisions of the Treaty it was necessary for the ECJ to define the category of workers in the specific Community context. In the case of the co-ordination of the social security regimes, however, there was no need for such a definition, since national provisions remained intact, and they have been mutually recognised by national administrations.

The material scope of the Regulation includes a large variety of benefits. The purpose was the same: to include all the variations in order to limit the possibility of

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<sup>49</sup> Council Regulation No 1408/71 on the application of the social security schemes to employed persons and their families moving within the Community; as amended. Administrative provision: Council Regulation No 574/72 as amended. It has to be noted that the co-ordination of social security systems is still on the agenda of the Council to ensure its proper functioning in the light of the changes in the labour market. E.g. with the introduction of the European citizenship which includes the right to free movement the Council enlarged the scope of the Regulation to civil servants, students and non-active persons.

<sup>50</sup> Steiner, Josephine: *Textbook on EEC Law* (1990) p.244.

<sup>51</sup> Reg. 1408/71; Preamble, 8th consideration

losing benefits. The benefits falling within the scope of the Regulation are those which provide long term benefits: sickness and maternity benefits; invalidity benefits including those intended for the maintenance or improvement of working capacity; old-age benefits; survivors' benefits; benefits in case of accidents at work and occupational diseases; death grants; unemployment benefits; and family benefits.

To co-ordinate the national systems and to avoid *lacunae* and overlaps between them the Regulation is built on six basic functional principles of which two, the principles of aggregation and of exportability, are incorporated into art.51 of the Rome Treaty:

*The Council shall [...] adopt such measures in the field of social security as are necessary to provide freedom of movement of workers; to this end it shall make agreements to secure for migrant workers and their dependants:*

*(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of several countries;*

*(b) payment of benefits resident in the territories of Member States.*

These two principles serve to build temporal continuity into each personal situation creating a homogenous provision across the Community territory.<sup>52</sup>

Among the principles included in the Regulation probably the most important is the prohibition of discrimination on the grounds of nationality. As discrimination often takes the form of the requirement to be resident in a certain Member State or to have a certain length of residence before being eligible for benefits, the Regulation therefore states that being resident in one Member State already fulfils the conditions to have equal treatment with the residents of any other Member State.<sup>53</sup>

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<sup>52</sup> Simitis, Spiros and Lyon-Caen, Antoine: *Community Labour Law: A Critical Introduction to its History* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.5.

<sup>53</sup> Steiner, Josephine: *Textbook on EEC Law* (1988) p.193.

During any particular period of time, only the law of the Member State where the worker is employed is applicable.<sup>54</sup> The principle is equally called as *lex loci laboris*. The main purpose of the Regulation is to ensure that a migrant worker does not risk losing his entitlement to benefits. It does not mean, however, that a worker can be unfairly enriched. According to the next principle of the Regulation no one can acquire or maintain the right to several benefits of the same kind for one and the same period of insurance. The principle of apportionment follows from the nature of the Regulation. It means that the financial burden of benefits may be divided between the competent national institutions for which the person paid throughout his working life in proportion to the length of the contribution.

As a concluding remark, the status of social objectives can be examined by comparing the Community context with the national one. Roccoella and Treu in their book on the labour law of the EC<sup>55</sup> deal with European social security law solely in the context of the assistance it provides to the mobility of workers. In contrast, Bercusson argues that social security has an autonomous set of objectives and doctrines which go far beyond assisting free movement and the method applied distorts the broader concept of social security law.<sup>56</sup> Here one can point to the fundamental difference between the realm of national social security law and the limited field of European social security law. The Regulation under consideration affects social security provisions as far as is necessary to create a functional network between national provisions. It does not intend to embark on substantive legislation, it does not aim to harmonise distinct national systems. The issues going beyond the scope of co-ordination remain within national competence.

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<sup>54</sup> With some exceptions regarding posted workers, persons employed in the territory of two or more Member States and frontier workers. (art.14. Reg.1408/71)

<sup>55</sup> Roccoella, Massimo and Treu, Tiziano: *Diritto del Lavoro della Comunità Europea* (1995)

<sup>56</sup> Bercusson, Brian: *European Labour Law* (1996) p.18.



The European Social Fund: an objective of social policy or an incentive for economic integration?

If the abolition of obstacles to free movement of workers is seen as a negative stimulation of labour mobility, the establishment of an adaptation fund to protect labour from the risks accompanying the establishment of the common market and to promote geographical and occupational mobility of workers has to be seen as a means of positive stimulation.

Although the European Coal and Steel Community (ECSC) had a similar institution, Kahn-Freund argues that the structure and function of the European Economic Community are so different from the Coal and Steel Community that the arrangements applicable to the latter have not been able to serve as a model.<sup>57</sup> The ECSC was primarily concerned with the social problems presented by the declining fortunes of the coal industry and its creation was coloured by memories of unemployment and war.<sup>58</sup> The EEC, on the other hand, was influenced by the possibility to create a larger economic unit prepared to accept the consequences of technological change and large-scale productive processes for the sake of higher productivity. Its scope was far larger and it affected the total population rather than workers of two industries, and furthermore the Treaty itself contained provisions which were potentially far-reaching in their scope.<sup>59</sup>

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<sup>57</sup> The two Funds were different in two major aspects: one was their financing, the other was their fields of application. As far as the financial question is concerned, the High Authority of the ECSC had the power to levy taxes whereas the Treaty of Rome did not confer such competence on the Commission, and the latter is thus financed by the contributions of the Member States. As regards the second issue, the field of application, a scheme applied in two specific industries has to be necessarily different from a scheme generally applied to a common market. (Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.352. and Shanks, Michael: *European Social Policy, Today and Tomorrow* (1977) p.2)

<sup>58</sup> The ECSC included complex and expensive measures aimed at easing the re-structuring of the industry and the consequent dislocation of its workers. (Bercusson, Brian: *Maastricht: a fundamental change in European labour law* (1996) 23 *Industrial Relations Journal* p.178; Lyon-Caen, Gérard; Lyon-Caen, Antoine: *Droit Social International et Européen* (1993) pp.160-163.

<sup>59</sup> Collins, Doreen: *The European Communities. The Social Policy of the First Phase* (1975) Vol.II. p.39.

In the respect that the main idea behind the ECSC Fund was *not* stability of employment, but on the contrary, *adaptation* of workers to economic change,<sup>60</sup> it can be seen as the precursor to the ESF. The European Social Fund was originally conceived as an EC-level active measure in a period of tight labour markets.<sup>61</sup> It was used to support labour market programmes but there were no initiatives in the field of social legislation as such.<sup>62</sup>

Despite the fact that it was provided for in the Rome Treaty, the European Social Fund started operating only in 1962.<sup>63</sup> According to the primarily economic nature of the integration process, art.123 defined the task of the Fund as rendering the employment of workers easier and of increasing their geographical and occupational mobility. The available means to achieve this increased mobility were: vocational retraining, resettlement allowances and granting aid for the benefit of workers in case of restructuring of an undertaking (art.125). Initially the main beneficiaries of the Fund were Italy and Germany, although not to the same degree. Most of the unemployed assisted, either in terms of geographical or occupational mobility, were Italians who moved either to other Member States or within their home country from the South to the North. The main reason for this flow was that in the first decade of the Community the unemployment rate was rather low, an average of 3.6%, and the only country where this phenomenon caused problems was Italy with its rate of 8.3%.<sup>64</sup> Thus it seemed to be appropriate to support mobility towards those regions of the Community where a shortage of labour was sharper.<sup>65</sup> However, since the main destination of migration was Germany, in financial

<sup>60</sup> Bercusson, Brian: *European Labour Law* (1996) p.45; Freedland, Mark: *Employment Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton pp. 294-95.

<sup>61</sup> Mosley, Hugh G.: *The social dimension of European integration* (1990) 129 *International Labour Review* p.151.

<sup>62</sup> Deakin, Simon: *Integration through Law? The Law and Economics of European Social Policy* (1997) in: Addison, J.T. and Siebert, W.S. (eds): *Labour Markets in Europe: Issues of Harmonisation and Regulation* p.121.

<sup>63</sup> Nielsen, Ruth and Szyszczak, Erika: *The Social Dimension of the European Community* (1991) p.27; Brewster, Chris and Teague, Paul: *European Community Social Policy. Its Impact to the UK* (1989) p.58.

<sup>64</sup> Hatt, Philippe: *Thirty years of ESF assistance* (1991) p.79.

<sup>65</sup> In the early times of the Fund's operation some 543.000 Italian workers participated in training of which 340.000 were resettled in France and Germany and 150.000 were still available for intra-Community migration by the end of 1968. (Brewster, Chris and Teague, Paul: *European Community Social Policy. Its Impact to the UK* (1989) p.60.)

terms the bulk of the support was spent in this Member State, as its infrastructure to provide training facilities was more developed.

At the beginning of its activity, the Fund had several disadvantages. It was set up as an adaptation fund and it worked as a piece of compensation machinery for the costs of the creation of the common market. The rules were not only restrictive but they also hampered technical adaptation and innovation because the support was available only after a long and bureaucratic period. Art.125(2) set out that:

*Assistance granted by the Fund towards the cost of vocational retraining shall be granted only if the unemployed workers could not be found employment except in a new occupation and only if they have been in productive employment for at least six months in the occupation for which they have been retrained.*

The conditions were very similar for resettlement allowances. In case of conversion of an undertaking the rules were more complicated, more time consuming and a large number of authorities were involved:

*Assistance for workers in the case of the conversion of an undertaking shall be granted only if:*

- (a) the workers concerned have again been fully employed in that undertaking for at least six months;*
- (b) the Government concerned has submitted a plan beforehand, drawn up by the undertaking in question, for the particular conversion and for financing it;*
- (c) the Commission has given its prior approval to the conversion plan. (art.125(2))*

Apart from the retroactive nature of the Fund another of its drawbacks was that as the Commission did not have discretionary power, it had to support an ever-growing number of projects which met the conditions thus the support was spread thinner and thinner. In addition, as the Fund was financed by the direct contributions of the Member States, logically they were interested in getting back that they paid. The narrowly-interpreted and narrowly-applied rules laid down in the Rome Treaty are a clear illustration of the fact that the ESF was indeed designed more as a compensation fund for

the changes brought about by the establishment of the common market than a fund to promote labour mobility beyond what was economically necessary at that historical moment.

### Social provisions

Interpreting the impact of the free movement provisions and the implementing measures on the co-ordination of social security systems and on the European Social Fund is not a complicated challenge given the underlying aim of economic integration.<sup>66</sup>

However, in interpreting of art.117 the exclusive nature of the market can be discussed:

*Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.*

*They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.*

The wording of art.117 is rather opaque or to a certain extent also mysterious. For example Nielsen and Szyszczak put forward the argument that the provisions on social policy were for the most part exhortatory and gave the Community an insecure legal base on which to build any coherent form of Community social policy.<sup>67</sup> Lord Wedderburn states that the agreement under art.117 to maintain the improvement of workers' standards and conditions was merely programmatic and did not signal a separate purpose, but was merely an aid to interpretation of the rest of the Treaty.<sup>68</sup>

<sup>66</sup> Mancini noted that the words of the Treaty were written by persons for whom the main value was competition (Mancini, Federico G.: *L'incidenza del diritto comunitario sul diritto del lavoro* (1989) 29 Rivista di Diritto Europeo p.26.), or that the founding fathers did not think to reduce the competence of the Member States if it did not seem indispensable for the good functioning of the common market (Mancini, Federico G.: *Il governo dei movimenti migratori in Europa: Cooperazione o conflitto* (1992) in: AA.VV.: *Il governo dei movimenti migratori in Europa: Cooperazione o conflitto*) p.21.

<sup>67</sup> Nielsen, Ruth and Szyszczak, Erika: *The Social Dimension of the European Community* (1991) p.17.

<sup>68</sup> Lord Wedderburn: *Labour Law and Freedom: Further Essays in Labour Law* (1995) p.387.

Art.117 has a crucial importance in light of the later development of the social dimension, so it has to be interpreted precisely in order to place the analysis in the right context. First one should refer to the work of Otto Kahn-Freund.<sup>69</sup> He argues that in art.117 uncertainty is created by the use of expressions such as living and working conditions,<sup>70</sup> harmonisation and approximation of laws of the Member States. Kahn-Freund illuminates the meaning of these expressions in context. He reminds the reader that art.117 shows the traces of a compromise between two policies, on the one hand that there should be a resort to harmonisation only where there are specific distortions of the common market (recommended by the Spaak Report and the position represented by the German delegation during the negotiations), and on the other, that elimination of gross distortions was not enough, but that it would be necessary to assimilate the entire labour and social legislation of the Member States completely so as to achieve parity of wages and social costs (the position emphasised by the French delegation).<sup>71</sup> This dualism is continuously present in the social provisions of the Treaty.

The multiplicity of values which influenced the wording of art.117 has also been raised. Collins states that: "In the light of the negotiations and of the Spaak report it seems clear that this statement is a fusion of a number of themes concerning the relation of a common market to the social charges of industry. It recognises the French position that these may be important, but takes no firm stand on whether it is necessary to take direct action on the matter and appears to have arisen, as in the case of the ECSC, for defensive, industrial reasons. Unfortunately for the evolution of social policy as welfare goal, the result was that the key article was both obscure and lacked any definite means of achievement. No guidance was given on the extremely complex matter of the definition of equalisation of living and working conditions or on the major issue of whether more

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<sup>69</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* pp. 297-459, in particular pp.300-303.

<sup>70</sup> The category of living and working conditions has to be understood as an aggregate which includes the most various social issues. (*ibid* p.303.)

<sup>71</sup> The author illustrates this discussion by the problem of the chicken and the egg that is to say whether the harmonisation of labour conditions is prerequisite or a consequence of the common market. He adds that the Commission also had great pains to clarify the interpretation of art.117. (*ibid* p.300-302.)

importance should be attached to the automatic working of the common market or to conscious action under the Treaty as a means of attaining this end."<sup>72</sup>

The picture becomes more colourful when one brings Community institutions into the equation. The institutions do not speak on an autonomous basis, but their interpretation and value choices can be understood through their practice. In the Commission's interpretation, art.117 should be read as follows: the automatising of the common market is permitted to have free play as long as it produces an equalisation of working conditions in an upward direction, but that corrective and planned action will have to be taken if such integration impedes social progress or -this is implied rather than expressed- leads to a deterioration in the conditions of the more advanced members.<sup>73</sup> This is to understand that the Commission rejected a narrow, restrictive interpretation and has urged the implementation of various measures to ensure the greatest possible improvement of working conditions.<sup>74</sup> However, at the other end of the decision-making process, the Council of Ministers have accepted a position that the social benefits of the common market will be brought along by the market itself and not by legislation. Legislation could be justified only where it is necessary to remove obstacles to the proper functioning of the market, and it was anticipated that such occasions for legislation would be few. It was not until the beginning of the 1970s that different conclusions were drawn regarding the social consequences of economic integration.

The interpretation of the next article of the social provisions incorporated in the Rome Treaty, that is of art.118, evokes similar difficulties, arising mainly from its programmatic nature.

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<sup>72</sup> Collins, Doreen: *The European Communities. The Social Policy of the First Phase* (1975) Vol.II. pp.21-22.

<sup>73</sup> The position was put forward with the support of the European Parliamentary Assembly and with the approval of the Commission and of its Social Affairs Group. (Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* pp.302-303.)

<sup>74</sup> Wallyn, L.: *The social policy of the Community and participation of the social partners in decision-making at European level. The Treaty of Rome* (1988) pp.13-14.

*Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to:*

- employment;*
- labour law and working conditions;*
- basic and advanced vocational training;*
- social security;*
- prevention of occupational accidents and diseases;*
- occupational hygiene;*
- the right of association, and collective bargaining between employers and workers.*

*To this end the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those concern to international organisations.*

*Before delivering the opinions provided for in this article, the Commission shall consult the Economic and Social Committee.*

In the words of Koopmans, art.118 creates a 'somewhat paradoxical situation': it confers a specific task on the Commission but is silent with regard to the sole power -that of making rules- which would allow it fully to perform that task.<sup>75</sup> Art.118 speaks only of the close collaboration between states and of the possibility of studies, consultation and advice; it is clear that this, too, was inadequate as a base for action to fulfil egalitarian goals.<sup>76</sup> Concerning the effect of art.118, Jacobs and Zeijen are rather sceptical: The entire paper mountain of the Brussels bureaucracy in social affairs -based on art.118- is impressive, but its fruits were rather disappointing because the work under art.118 does not necessitate subsequent action or follow-up procedures.<sup>77</sup> Consequently such an imprecise and ambiguous wording of an eventual Community intervention might have helped little, if at all, to promote Community initiatives focused on social objectives.

<sup>75</sup> Koopmans: *The Law of the European Community* (1976) in: AA.VV.: *A Commentary of the EEC Treaty* Vol.III. p.748.

<sup>76</sup> Collins, Doreen: *The European Communities. The Social Policy of the First Phase* (1975) Vol.II. p.159.

<sup>77</sup> Jacobs, Antoine T.J.M. and Zeijen, Hans: *European Labour Law and Social Policy* (1993) p.2.

In order to establish the necessary conditions for fair competition, some intervention in the social field seemed to be indispensable to create equal conditions in the common market. The Spaak Report had already proposed maintaining the existing similarities between the Member States in the systems of paid holidays and working time.<sup>78</sup> This recommendation led to art.120 of the Treaty.<sup>79</sup> Another example of the interventionist approach was the incorporation of art.119. The French delegation insisted on introducing, at European level, the principle of equal pay for equal work, as they were afraid that their economy would be ruined by other countries taking competitive advantage from their cheaper female labour, given that at that time French national law already contained this principle.<sup>80</sup> At this point one can see an example of that theory according to which European integration was oriented towards functional objectives, reflecting specific national interests rather than well defined common interests.<sup>81</sup>

Anticipating the further development of the social dimension we have to note that among the social provisions only art.119 imposes a direct obligation on Member States to take concrete steps towards ensuring that equal pay for equal work is guaranteed for men and women.<sup>82</sup> In light of subsequent developments, this norm can be regarded as an exception among the articles of the social provisions: not a tribute to the prevailing values of the market, but an innovative breakthrough, aimed at the establishment of fundamental principles of individual rights.<sup>83</sup> This development is largely due to the activity of the ECJ because, as Kahn-Freund remarks, the Member States did not go further than to accept an

<sup>78</sup> The Spaak Report (1956) pp.62-63.

<sup>79</sup> art.120: Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

<sup>80</sup> Brewster, Chris and Teague, Paul: *European Community Social Policy. Its Impact on the UK* (1989) p.55; Streeck, Wolfgang: *Neo-Voluntarism: A New European Social Policy Regime* (1995) 1 *European Law Journal* p.40.

<sup>81</sup> Milward argues that the destiny of Community institutions was to strengthen national economic policies. The Communities were the fruit not of a weakened national state, but of a reinforced one. For example the idea of the ECSC institutionally was promoted by the French *Commissariat du Plan* and the main aim of integration was to preserve the political and economic influence of France on the international scene. Integration similarly served German interests as the only way out of its post-war isolation. (Milward, Alan S.: *L'Europa in formazione* (1993) in: *Storia d'Europa*, Vol.I. in particular pp.191-197.)

<sup>82</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.301.

<sup>83</sup> Sciarra, Silvana: *European Social Policy and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law Vol.IV. Book 1.* p.315.



obligation to each other and to the Community to transform their system of wage rates so as to ensure the application of the principle. Art.119 does not, therefore, confer any rights or impose any obligations on any individual based on the principle of equality.<sup>84</sup> Armed with the tools of direct effect and supremacy of EC law some years later, an individual claim was, however, sustainable before the Court of Justice.<sup>85</sup>

### Prospects for European social policies

At the beginning of this chapter, the question was raised whether the Treaty contained a social objective and, if so, under what limitations. The value judgements of the founding fathers could be identified by analysing the provisions of the Treaty. The examination led to the conclusion that although the Treaty did not have a social objective *per se*, some attention was focused on the social consequences of the economic integration process. This attention was embedded in the economic process itself, it concerned the establishment of equal conditions in the common market, and a means of compensating for the social charges of this process. On the basis of the principles and provisions enumerated there was a fear among legal writers that the embryonic social policy law of the original Treaty of Rome would never develop fully.<sup>86</sup> Notwithstanding all the ambiguities, the social dimension has developed during the decades. What we have to clarify at this point are those elements which could be the founding blocks of this nascent social dimension.

The first point of reference is art.2 of the Rome Treaty, which laid down as an objective of the EEC the raising of the standard of living. Yet it is difficult to imagine a judgement of the European Court of Justice declaring a regulation or a directive to be

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<sup>84</sup> Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E. and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.329.

<sup>85</sup> Defrenne II, Case 43/75 [1976] ECR 455. Davies, Paul: *The European Court of Justice, National Courts, and the Member States* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.102.

<sup>86</sup> Nielsen, Ruth and Szyszczak, Erika: *The Social Dimension of the European Community* (1991) p.15.

invalid as conflicting with art.2 of the Treaty.<sup>87</sup> Since art.2 is too general in its formulation and can hardly serve as a specific legal basis, we have to concentrate on the other provisions.

The free movement of workers is one of the four basic freedoms of the Community on which the common market is founded. The creation of a common labour market inevitably brought about social and legal problems, which had to be resolved in the early phase of the integration process. The establishment of common rules and principles that apply to the general phenomenon of migration was largely helped by the ECJ. As we have shown through various cases, the Court has become fully aware of the enormous burden in human terms of the problems created by the movement of workers. To promote labour migration and to contribute to the proper functioning of the common market a regulation for the co-ordination of social security systems of the Member States was approved at an early stage of the Community. Although minor amendments and updatings have taken place, the free movement legislation cannot be seen as a source of new issues which might enlarge the social dimension.

The social provisions, notably art.117 and 118, given their programmatic nature were not properly implemented during the first decade of the Community's history. Notwithstanding the ambiguous interpretation based on the dualism of ideologies, there is the potential basis for a future expansion of social regulations precisely because the provisions can gain a different interpretation in a different political context through the interaction of various actors able to influence Community legislation. As Mancini points out, the social provisions are a battery of instruments, with which the Community has been equipped for the purpose of implementing a social policy.<sup>88</sup> Art.119 tells us a completely different story. The equal treatment saga of the Community legislation grew out of this article with the active participation of the Court of Justice as a midwife.

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<sup>87</sup> Daubler, Wolfgang: *Instruments of the EC Labour Law* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.154.

<sup>88</sup> Mancini, Federico G.: *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.10.

The original activity of the ESF was narrowly based on art.123 and it worked as a pure compensation fund for the costs caused by the creation of the common market. At this time free circulation of workers was thought of in relation to a redistribution of work within the Community, in an optimal context of full employment.<sup>89</sup> As will be discussed in the coming sections, since the beginning of the 1960s the Fund has had to face a number of diverse challenges and has taken on the responsibility of facilitating the adaptation of workers to continuously changing labour market conditions. By making decisive steps to change its original function as an adaptation fund, through smaller reforms, the Fund has become a mechanism for active labour market policy. Thanks to its transformation, the Fund has contributed to the formulation of the social dimension to a large extent and through its various employment, training or adaptation programmes, has constituted an important share of the present realm of the social dimension.

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<sup>89</sup> Sciarra, Silvana: *European Social Policy and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law Vol.IV. Book 1.* p.313.

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## **Chapter II**

### **COMMUNITY POLICIES TO PLAY A ROLE IN THE SOCIAL FIELD**

The argument advanced in this chapter is that, notwithstanding the strong belief in harmonious economic and social development, for the second half of the 1960s -in a changing political and economic context- the importance of social values gained a stronger position in the discourse of integration and this took the form of Community initiatives. We have to examine thoroughly why and how this shift in value judgements took place, and to identify properly the path this development took. Although the main events of this period of the European integration process are widely known, recalling them can explain the origins of further developments and put the spotlight on the value choices.

The investigation has to start with those events which caused a shift from the ideological orthodoxy that placed its faith entirely on market forces. Briefly, these reasons were on the one hand the economic crisis which hit the Community at the end of the 1960s, and on the other, not entirely unconnected to the first, the new political climate in most Member States. The new leaders, being mainly social-democrats, proved to be more sensitive to social issues than their predecessors.

By the time the common market had been in operation for more than a decade it began to bear its fruit. Economic boom, rising standards of living, new kinds of social benefits and welfare treatments characterised this period. However, this growth was unevenly distributed. Most of the new job opportunities were created in the central areas of the Community, whereas the peripheral areas witnessed growing unemployment. The unevenness of growth was reflected in the society as well, and certain groups of the labour market such as women, disabled people, school-leavers or older workers faced difficulties on the job market. Together with the rise in the standard of living there was a growing

demand for better working conditions and industrial democracy. Workers' strikes and student unrest expressed the dissatisfaction of the citizens. The situation was worsened by the halt in economic growth, the consequences of the first oil-price shock and by the growing unemployment rate.<sup>1</sup> As Michael Shanks, Commissioner of Social Affairs between May 1973 and January 1976, put it: "the moment arrived when a new set of priorities was needed to provide the momentum for a further great leap forward to a future united Europe".<sup>2</sup>

The first enlargement of the Community, with Denmark, Ireland and the United Kingdom also contributed to the diversification of the situation and underlined the necessity to develop a more articulated solution to the social consequences of the integration process, since these countries brought along a diverse set of social systems and employment practices. Hepple summarises the situation as follows: "It was only when the boom began to fall apart, when economic integration within the Common market was visibly failing to protect working and living standards, and when a wave of strikes and wage explosions had swept across Europe, that EEC labour law came to life."<sup>3</sup>

### Political and economic climate in the Community at the end of the 1960s

The need to paint a 'human face' on the Community<sup>4</sup> became a tangible reality at the Paris Summit of the Heads of States and Governments held at the end of 1972. The Final Communiqué of the Paris Summit promised a new concept of integration which: "... attached as much importance to vigorous action in the social field as to the achievement of the economic and monetary union. [...] it is essential to ensure the increased

<sup>1</sup> In 1974 the unemployment rate was still under 3%, but it already ment a worsening compared to the optimal full employment. (source: COM(93)700; p.55.)

<sup>2</sup> Shanks, Michael: *European Social Policy Today and Tomorrow* (1977) pp.2-6.

<sup>3</sup> Hepple, Bob: *The Crisis in EEC Labour Law* (1987) 16 *Industrial Law Journal* p.78. For similar opinion see Daubler: "The decision-makers have always recognised the necessity of certain steps in the social field, but their will to take concrete measures has not -to put it diplomatically- always been evident. In the absence of well-organised European labour movement, the main political reason for taking action in the field of labour law is the need to win support from the populations of the Member States. (Daubler, Wolfgang: *Instruments of EC Labour Law* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton p.166.)

<sup>4</sup> The expression is attributed to Willy Brandt.

involvement of labour and management in the economic and social decisions of the Community."

On the political scene, in the key countries of the Community, parties, mainly social democrats, came into power which showed a strong commitment towards social values. In Germany, Chancellor Willy Brandt, in France President Pompidou and in the United Kingdom Prime Minister Heath exemplified this political line. All of them had a strong domestic position and their close personal links also helped to elaborate the new Community approach. However, to avoid exaggerating the existence of a complete and penetrating breakthrough of social values, the proper context of the Paris Summit has to be explored.

The context established by the Rome Treaty is based on the realisation of a common market by the free circulation not only of goods, services and capital, but also of the factors of production themselves, that is of capital of men. After the initial phase of integration when the main obstacles were abolished, positive efforts had to be taken to create equal conditions of competition.<sup>5</sup> In this respect the social aspects of the production process were significant. The argument for a social policy was still one that subordinated social policy to economic goals; but it was now accepted that economic growth through closer European economic integration would require the support of a *Community* social policy, both to ensure that the benefits of growth were adequately diffused throughout Europe and to help to socialise the costs of economic growth. What had changed since the middle of the 1950s was not the economic nature of the policy context in which social policy was discussed but, rather, the conclusions that were drawn from that discussion as to the desirable extent of the Community's involvement in social policy.<sup>6</sup>

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<sup>5</sup> It is interesting to note, that Willy Brandt and his Social Democratic Party were committed to social progress and were particularly keen on the introduction of employment protection legislation. The German Chancellor had a good reason to support similar initiatives on Community level undercutting the argument of German employers that the proposed domestic legislation would reduce the competitiveness of the German industry. The Community employment legislation would eliminate the incentives to shift investments from Germany to other European countries. (Sandler, Andrew, L.: *Players and Process: The Evolution of Employment Law in the EEC* (1985) 7 *Comparative Labor Law* p.4.)

<sup>6</sup> Davies, Paul: *The Emergence of European Labour Law* (1992) in: McCarthy, W. (ed): *Legal Intervention in Industrial Relations; Gains and Losses* p.326. See for similar comments: Hardy, Stephen and Adnett, Nick:

Despite the social pressure and the underlying economic pressure to create largely similar employment conditions throughout the common market, the acceptance of social commitments on the part of the Community was not so evident. The Commissioner responsible for Social Affairs asserted that the initiatives following the Paris Summit reflected a political judgement of what were thought to be both desirable and possible rather than a judicial judgement of what were thought to be the social implications of the Rome Treaty. The Treaty did not actually *require* a social programme of this kind. Its justification is political, not judicial. But as economic conditions worsened during 1974 and after, one noticed in Brussels a growing tendency to query the desirability, not of this particular social action programme but of *any* Community social programme which did not flow inescapably from the Rome Treaty provisions.<sup>7</sup>

It would be difficult to argue for a stable legal foundation for a political decision. It was the political climate which favoured stronger commitments and gave some provisions of the Treaty an interpretation which made it possible to base legislation on it. Lo Faro summarises this as follows: "In their interpretative efforts some of those searching for possible foundations for an adequate social policy try to make the Treaty say what actually it does not say".<sup>8</sup> The most precise formulation of the problem was put forward by the Commissioner himself: "Can European integration be achieved on a relatively narrow *laissez-faire* basis set out in the Treaty of Rome? If not, what more is needed? And can the extra element, whatever it is, be meaningfully pursued by a European Community structured as ours is today -in other words, can political will adequately supplement the Treaty or supplant it? Or -to put the same question in a slightly different way- does the European Community have a role to play in the social field (broadly defined to include the other 'human face' or 'quality of life' fields) over and above its Member States? If so, what

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*'Entrepreneurial Freedom Versus Employment Rights': The Acquired Rights Directive and EU Social Policy Post-Amsterdam* (1999) 9 *Journal of European Social Policy* p.128;

<sup>7</sup> Shanks, Michael: *European Social Policy Today and Tomorrow* (1977) pp.13-14.

<sup>8</sup> Lo Faro, Antonio: *Maastricht ed oltre. Le prospettive sociali dell'Europa comunitaria tra resistenze politiche, limiti giuridici ed incertezze istituzionali* (1993) *Diritto delle relazioni industriali* p.131.



it is? If not, what is the degree of social diversity (again, broadly defined) which the European Community can tolerate and survive?"<sup>9</sup>

Collins pointed to a practical solution: "Where little guidance was given by the Treaty the onus was upon the Commission to create policies if anything was to be done."<sup>10</sup>

The Paris Summit: "... attached as much importance to vigorous action in the social field as to the achievement of the economic and monetary union. ..."

Building on this political background, social initiatives were taken in three directions. The first was the launch of a Social Action Programme, which in itself was a policy initiative, but its realisation was intended through Community legislation. These initiatives pointed to the social aspects of the production process and yet the orientation was fundamentally economic; the results, social in character, were modest but not at all negligible: they gave birth to European labour law. The second direction further enhanced the promotion of labour market regulation established by the ESF in the Rome Treaty. Labour market initiatives were increasingly supported by the Commission. The third direction pointed to the involvement of the social partners in the articulation and implementation of Community initiatives. The follow-up to the development of this co-operation requires a very careful and cautious examination, as the process was rather flexible, happened mainly on an informal basis and gave political considerations an important role. The examination of the development of the co-operation between the social partners will be very limited, in fact limited to illustrating the field of action where the nascent Community social dimension could find support.

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<sup>9</sup> Shanks, Michael: *European Social Policy Today and Tomorrow* (1977) p.9.

<sup>10</sup> Collins, Doreen: *The European Communities. The Social Policy of the First Phase* (1975) Vol.II. p.32. Emphasis added. This is a situation what in more general terms Weiler comments as follows: "... despite the massive legislative expansion of the Community jurisdiction/competences/powers and the collapse of constitutional guarantees against that expansion, there had not been any political challenge or crisis on the issue from the Member States other than on an *ad hoc* basis." (Weiler, Joseph H.H.: *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration* (1993) 31 *Journal of Common Market Studies* p.435.

Although the analysis of the case law does not form a major part of this discussion, the role of the Court of Justice should not be ignored, since it has also played a very active role, from the end of the 1960s in giving more importance to social issues than intended by the founding fathers. Its evolving interpretation and judicial activism contributed substantially to the re-evaluation of the role of social values in the context of economic integration. This changing perception of values can be precisely illustrated by the case which can also be considered as the point of departure of the equal treatment saga.<sup>11</sup> The Court declared that art.119 had a 'double aim' of which the social one was at least as important as the economic one. It made advances on the social front from what appeared at first sight to be an impossibly narrow bridgehead in the shape of the Social Policy provisions of the Treaty of Rome.<sup>12</sup>

The three directions of European social policy which started to develop after the Paris Summit on the basis of the political authorisation of the heads of states and governments were reviewed not to enumerate an impressive catalogue of historical data, but more to point to the particularities of the Community's social dimension which were born in the 1970s and still today characterise this aspect of the European Union.

The first social action programme in the history of the Community was launched following the Council's Resolution in 1974. The SAP of 1974-76<sup>13</sup> contained three broad

<sup>11</sup> In 1971 the case of Ms Defrenne, stewardess with the Sabena Belgian Airlines was first brought before the Court of Justice. Ms Defrenne and her advocate, Eliane Vogel-Polsky challenged a provision of Belgian law and argued that it was incompatible with the Rome Treaty in that it provided that female workers reached the age when they were eligible for the old age pension earlier than their male colleagues; consequently female workers were deprived of the opportunity to obtain a longer period of service and ultimately obtain a higher amount of old-age pension. The Court said that the treatment provided for by national pension systems is irrelevant from the point of view of art.119 of the Rome Treaty (*Defrenne v Belgium* (Case 80/70) [1971] ECR 455).

But the applicant did not surrender, and in 1975 the Court revised its own judgement and held that art.119 is directly applicable, and national provisions contradictory to Community law have to be amended. In the revised judgement the Court argued that "art.119 ... forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of living and working conditions of their peoples." (*Defrenne v Sabena* (Case 43/75) [1976] ECR 455; paras 8-10.)

<sup>12</sup> Davies, Paul: *The European Court of Justice, National Courts, and the Member States* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.125.

<sup>13</sup> OJ C 13/1; 12.02.1974.

guidelines: Full and Better Employment; Improvement of Living and Working Conditions; and Participation. The most important legal instruments arising from the SAP are the Directives on collective redundancies,<sup>14</sup> on the transfer of undertakings<sup>15</sup> and on workers' protection in an insolvency situation.<sup>16</sup> Other results of the Programme were the European Centre for the Development of Vocational Training (Cedefop) and the Dublin Foundation for the Improvement of Living and Working Conditions set up in 1975, just as the European Regional Development Fund was established in the same year. The expansion of the activity of the ESF also took place during this period of time.

What we now have to examine more thoroughly is the way that the Social Action Programme was intended to be implemented. Obviously, reference to articles 117-118 was not sufficient, because of their nature of programme.<sup>17</sup> The absence of specific labour law provisions in the Treaty necessitated reliance on the provision on the approximation of laws, art.100 or on the general clause of 235.<sup>18</sup> To apply art.100 the following conditions had to be fulfilled: only directives could be issued for the approximation of national provisions; these directives had to be approved unanimously in the Council and they had to be on issues which affected directly the functioning of the common market. Art.235 could only be used as a legal basis if there was a need for Community action in order to attain one of the objectives of the Treaty in the course of the operation of the common market, with the added condition that the Treaty did not already provide the necessary powers. As in the case of art.100, legislative action was subject to unanimous voting, a requirement which proved to be a good opportunity for Member States to challenge the

<sup>14</sup> Directive 75/129; OJ L 48/29; 22.02.1975. Amended by: Directive 92/56; OJ L 245/3; 26.08.1992. The last amendment, which replaced the two former Directives: 98/59; OJ L 225; 12.08.1998.

<sup>15</sup> Directive 77/187; OJ L 61/26; 05.03.1977. Amended by: Directive 98/50; OJ L 201/88; 17.07.1998.

<sup>16</sup> Directive 80/987; OJ L 283; 20.10.1980.

<sup>17</sup> Streeck remarks that the Action Programme drew on long-dormant Treaty commitments like those relating to 'harmonisation of working conditions'. (Streeck, Wolfgang: *Neo-Voluntarism: A New European Social Policy Regime* (1995) *European Law Journal* p.42.) On the contrary, Hepple states that "what has been noticeably absent, is any directive under art.117 of the EC Treaty to make possible the harmonisation of laws on individual dismissals, nor even any significant action under art.118 to promote 'close co-operation' between Member States in this respect." (Hepple, Bob: *European Rules on Dismissal Law* (1997) 18 *Comparative Labor Law Journal* p.205.)

<sup>18</sup> Sandler calls art.235 as a 'catch-all' provision which grants the EEC implied power to take necessary action to achieve Treaty objectives when no explicit Treaty provision applies. (Sandler, Andrew L.: *Players and Process: The Evolution of Employment Law in the EEC* (1985) 7 *Comparative Labor Law* pp.5-6.)

legal basis or hinder the enactment of Community initiatives which did not fully serve their national interests.<sup>19</sup> Consequently recourse to art.100 and 235 ensured not only the respect of national interests and prerogatives, but the priority to economic considerations as well, such that it not only excluded purely social legislation, but substantially limited its ability to incorporate values other than economic ones.

Art.117 was also mentioned in the Preamble to the Directives to implement the SAP. The problem arose how the directives could promote the harmonisation and approximation of national laws as envisaged in art.117. According to art.189, a directive gives Member States a free hand in designing the appropriate national provisions to make national law conform with the result prescribed by the directive according to their particular national requirements whilst at the same time respecting the unity of Community law.<sup>20</sup> Bercusson examines the same problem more in depth with some perplexity: The starting point of a policy of harmonisation is the identification of a problem *common* to various European countries and the attempt to harmonise the law and practice relating to the problem. It emerges, however, that the identification of *common* problems, when related to the *varying* labour laws of selected national systems, does not produce a harmonised view of law and practice. [...] This is mirrored in the *formal* successes of harmonisation policy (e.g. Directives), but in the variable consequences in practice of this formal success.<sup>21</sup>

In the context of the transfer of undertakings Directive the Court of Justice pointed out that a directive "is intended to achieve only a partial harmonisation, essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case when an undertaking is transferred. It is not

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<sup>19</sup> Nielsen and Szyszcak note that for these reasons most measures previewed by the SAP were diluted by the Council. Even in areas where Community intervention was achieved the measures were piecemeal and limited in scope. (Nielsen, Ruth and Szyszcak, Erika: *The Social Dimension of the European Community* (1991) p. 28; 30; Hepple, Bob: *The Crisis in EEC Labour Law* (1987) 16 Industrial Law Journal p.83.)

<sup>20</sup> Strozzi, Girolamo: *Diritto istituzionale dell'Unione Europea; Dal Trattato di Roma al Trattato di Amsterdam* (1998) p.166.

<sup>21</sup> Bercusson, Brian: *European Labour Law* (1996) p.52. On the use of comparative methods in labour law and industrial relations see: Blanpain, Roger: *Comparative Labour Law and Industrial Relations* (1985) in particular Chapter I: Comparativism in Labour Law and Industrial Relations

intended to establish a uniform level of protection throughout the Community on the basis of common criteria."<sup>22</sup> Dehousse further sharpens the focus: "The Community was supposed to act only if, and to the extent, that national regulatory policies had an adverse effect on the establishment of a unified market. It was therefore proper to limit its intervention to the mere harmonisation of national provisions, rather than endowing it more substantial means of action."<sup>23</sup> In such a context the Final Declaration of the Paris Summit gains a rather restrictive interpretation "to attach as much importance to vigorous action in the social field as to the achievement of the economic and monetary union" but not exceeding that limit necessary for the economic integration.

Yet the Directives should not be underestimated just because of their market orientation. The Court of Justice took a very active role in the enforcement of the protection provided for by Community legislation, through the application of the principle of direct effect,<sup>24</sup> which ensures an effective judicial protection of individual rights in relation to the Member States and full implementation of the necessary secondary legislation where the Commission has sought to bring proceeding before the Court under art.169.<sup>25</sup> This has meant that whereas there has not been strict uniformity or full harmonisation there has, nevertheless, been an obligation on the Member States to uphold the minimum standards required to make the directives available as a means of protecting individual employees.<sup>26</sup>

<sup>22</sup> *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* (Case 324/86) [1988] ECR 739. para.16.

<sup>23</sup> Dehousse, Renaud: *Integration v. Regulation? Social Regulation in the European Community* (1992) EUI Working Paper, Law No.92/23. p.9.

<sup>24</sup> Among the first cases *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1. See generally: Curtin, Deirdre: *Directives: The Effectiveness of Judicial Protection of Individual Rights* (1990) 27 CMLReview pp.709-739; Szyszczak, Erika: *Social Rights as General Principles of Community Law* (1995) in: Neuwahl, N. A. and Rosas, A. (eds): *The European Union and Human Rights* p.209.

<sup>25</sup> To illustrate that the issue is still pertinent see a more recent case which showed that the employer can refuse to recognise workers' representatives and in this way might be exempted from its obligation to inform and consult: *Commission v UK* (Cases C-382/92 and C-383/92) [1994] ECR I 2435, 2479. For comments on the cases see among others: Lord Wedderburn: *British Labour Law at the Court of Justice* (1994) 10 IJCLIR pp.339-359; Davies, Paul: *A Challenge to Single Channel* (1994) 23 Industrial Law Journal pp.272-285; Lyon-Caen, Gérard: *La Royaume-Uni, mauvais élève ou rebelle endomptable?* (1994) *Droit Social* pp.923-930.

<sup>26</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy; Essays in Memory of Malcolm Mead* p.19.

Although the protection of individual employee rights was rather limited it still has to be recognised as a big achievement of the Social Action Programme.<sup>27</sup> The SAP was a point of impact where two sets of conflicting fundamental values had to be reconciled. One set was fuelled by the political desire to socialise the costs of the integration process and to ensure the adequate diffusion of the benefits of growth, the other set was backed up by the fundamentally economic orientation of the integration process. In other words, as dictated by the narrow legal basis, initiatives of a social nature had to be squeezed into a framework which denied values other than economic ones. After the elimination of obstacles restricting the free movement of labour, attention was focused on positive action aimed at removing of obstacles which distorted competition, and thus in the context of the common market a European labour law could be conceived.

We turn now to examine how these considerations impact on two Directives: on collective dismissals and on acquired rights. The examination will be very limited and the aim of this exercise is not so much to analyse the content of these directives as to verify whether the context in which we placed the SAP was appropriate.

In their Preambles both Directives refer to the need to afford greater protection to workers in case of a crisis situation such as collective dismissals, or the change of employer. Apart from this consideration the Preambles concentrate on factors which are influential in the functioning of the market, such as the existing differences in legislation between the Member States;<sup>28</sup> the need to ensure a balanced economic and social development within the Community; or to facilitate restructuring of undertakings in

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<sup>27</sup> The protection provided on Community level can further lose its value if we bear in mind that in this period the protection provided by national labour laws increased substantially. This period can be described as one of relatively high employment, where job security was one of the primary goals of social policy and of legal intervention. During the 1970s in Europe, there was a substantial increase in state intervention with growing emphasis on the participation of workers' representatives and an increasing reliance on law to create rights to secure jobs outside the sole control of the employer.

<sup>28</sup> See Mancini: "Like it or not, upstream from enlightenment and welfare there is no getting away from the conditions of competition. If a country can authorise redundancies on less stringent conditions than other countries its industry will be given an incalculable advantage. And it is against the advantage that war is being declared." (Mancini, Federico G.: *L'incidenza del diritto comunitario sul diritto del lavoro degli stati membri* (1989) 29 *Rivista del Diritto Europeo* p.31. and *Labour Law and Community Law* (1985) 20 *The Irish Jurist* p.12.)

response to economic trends. Both directives refer in their initial sections to art.100, as the legal basis and they only make reference to art.117 in the final sections. Thus, at the heart of the legislation was not the protection of workers' rights, but the values of free competition.<sup>29</sup> This statement is reinforced by the comments of the national delegations, offering perspectives on the proposed collective dismissals Directive which reflected views other than that of pure employment protection. The British and the German delegations stated that the proposal was not concerned with individual rights but was an attempt to resolve problems arising in the labour market by a series of procedures aimed at reducing or eliminating the negative effects of mass layoffs. The French saw the proposal as one concerned with the interest of the undertakings.<sup>30</sup>

To diminish this genetic mutation recourse was made to minimum standards equal for all workers in the Community.<sup>31</sup> The primary message that the Directive on collective dismissals transmits is to stabilise the labour market and to make the procedure for layoffs more transparent. The Directive defines the scope and meaning of dismissals in its first article. It establishes a consultation procedure between the employer and workers' representatives with the fundamental aim to avoid, if possible, or at least reduce, the number of workers affected by the planned dismissals. The employer is obliged to notify the competent authority in writing; such notification has to contain all relevant information, in particular: the reasons for redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be carried out. According to the Directive, it is the obligation of the competent labour market authority to seek and find a solution to the problems raised by the projected dismissals. For this reason, the layoffs cannot take place earlier than 30 days after the notification, a period which can be extended if need be.

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<sup>29</sup> Freedland, Mark: *Employment Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton pp.289-291.

<sup>30</sup> EIRR 1974; No 2. pp. 2-5; and No 4. pp.18-19.

<sup>31</sup> Sciarra, Silvana: *Diritti dei lavoratori e mobilità: alcuni accenni alla normativa europea* (1993) in: Pagano, S. (a cura di): *Verso un diritto del lavoro europeo; La disciplina dei trasferimenti d'azienda e dei licenziamenti collettivi* p.35.

The Directive in fact does not limit the right of the employer to carry out the projected dismissals, and the workers' representatives are not granted rights which would constrain employers, by forcing them to enter into substantive negotiations. The only innovation of the Directive is the notification process, but it primarily serves the interests of the labour market, in balancing of supply and demand.<sup>32</sup>

The main aim of the Acquired Rights Directive is to remove those differences in the common market which would obstruct the rapid adjustment of enterprises to changing economic conditions, by providing common minimum standards regarding the rights of employees. These differences are to be found in the divergent legislation in the Member States. This Directive states that the transfer of a business or part of a business does not constitute in itself grounds for dismissal, but at the same time this provision does not stand in the way of dismissals that may take place for economic, technical or organisational reasons (art.4). Another provision (art.6(5)) specifies that Member States may provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed about the transfer. The consultation procedure between the employer and the employees' representatives is limited in the same way as in the Directive previously examined, namely, it does not empower the weaker side with the right to insist on substantive negotiations.

The Directives enacted on the basis of the Social Action Programme 1974-76 focused on labour market regulation and dealt only with crisis situations. They served to provide a limited degree of consultation over collective dismissals, continuity of employment and transfer of acquired rights in certain circumstances, and to provide a

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<sup>32</sup> In 1992 the original Directive on collective dismissals was amended, and numerous provisions were inserted to enforce workers' protection. The rules regarding the personal scope and the situations covered became stricter. The employer must begin consultations with workers' representatives. These consultations have to cover not only the possible avoidance or reduction of the layoffs, but negotiations have to be started on the accompanying social measures which are designed to redeploy or retrain the redundant workers. The Directive contains a detailed enumeration of the information the employer has to supply, and the workers' representatives may have recourse to experts. Taking into account the increasing presence of multinational companies, an employer cannot be exempted from the responsibility by relying on the argument that he had no previous information about a dismissal decided by a controlling undertaking. The Directive also prescribes that Member States have to ensure judicial and/or administrative remedies to enforce the rights deriving from the Directive. (Directive 92/56; OJ L 245/3; 26.08.1992.)



guaranteed payment to employees in the event of the employers' insolvency.<sup>33</sup> Thus, through secondary Community legislation in a limited field, individual rights have been constitutionalised, creating a right of action and a remedy at national level.

However, as history shows us, the further development of social and labour initiatives then faced insurmountable obstacles since they were based on political commitments. The enthusiasm exhibited in 1972, to attach the same importance to actions in the social field as in the economic one, disappeared until 1976. The three key individuals promoting the 'human face' of the Community lost office and there were changes in the political direction of other Member States as well. In these circumstances, the concepts accepted at the Paris Summit could not have a long-lasting effect. Those initiatives bear witness to the commitments which in the meantime became institutionalised or binding. Nevertheless, fundamental lessons can be drawn from the first attempt to stretch the framework of the Treaty and one cannot deny that some success was achieved by these initiatives. The main lesson to bear in mind and to scrutinise is what political will is able to achieve and how far these achievements are capable of resisting opposing political intentions. This is a point of fundamental importance, since during the history of the European integration, political initiatives and authorisation very often launched the Community towards more intensive co-operation. This mechanism is very typical in the development of the social dimension of the Community. The first attempt to confer a social dimension on the Community in fact contained within it all the peculiarities of the future social initiatives, both in terms of the strengths and the weaknesses.

#### The establishment of the European Regional Development Fund

There is another institution the establishment of which shows that, whilst the fundamentally economic nature of the integration process did not change during the 1970s, nevertheless, opinions did alter as to the desirability of Community involvement in

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<sup>33</sup> But there has been a continued resistance to the introduction of a more general, systematic and institutionalised right to employee participation in corporate decision-making. (Barnard, Catherine: *EC Employment Law* (1995) p.406.)

the redistribution of the costs and benefits of the integration. In 1972 at the Paris Conference, the Heads of State and Government agreed that a high priority should be given to correcting the structural and regional imbalances which might affect the realisation of the economic and monetary union.<sup>34</sup> It was recognised that the EMU would impose strict disciplines on the Member States, and that these would hit hardest the weakest countries and regions, which tended to be those on the periphery of the Community. The fundamental aim of such structural intervention was to help to create the conditions for regions lagging behind in their development to participate fully in the integration process and to share in both the economic and social benefits of this integration. As shown by the history of the instruments devoted to this aim, the social imperatives were still secondary to the economic ones: the structural interventions were intended to facilitate adaptation to economic changes. The redistribution schemes contributed to the creation of a viable basis for future oriented activities and conditions required for self-sustained regional growth. Until the early 1980s the bulk (80%) of resources was used to assist investment in basic economic infrastructure.<sup>35</sup>

Modern economic developments often appear to accentuate rather than diminish regional differences and the creation of a single trading area could be expected to increase this tendency by allowing even easier concentration of industry and population in the industrial heartland, leaving the peripheral areas to stagnate. The founding fathers of the Community were well aware of the emerging regional problems; it was evident from the Preamble of the Rome Treaty, according to which Member States were anxious to reduce the differences existing between various regions and the backwardness of the less favoured regions. In spite of warnings by academics that European integration would spell problems for certain regions, the EEC Treaty made no provisions for a European regional policy in the proper sense. Only some dispersed articles referred to the underdeveloped regions, and these provisions allowed state aid to the extent that it was compatible with the common market.<sup>36</sup> In contrast to the narrow economic view, the argument from social

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<sup>34</sup> Bull. of the EC 1972/10. p.9.

<sup>35</sup> Molle, Willem: *The Economics of the European Integration; Theory, Practice, Policy* (1994) p.437.

<sup>36</sup> See art.92 of the EEC Treaty. Aid granted by the Member States or through State resources may be considered to be compatible with the common market if the aim is to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, or to

justice arose only at the end of the 1960s, when it was recognised that the existing discrepancies were no longer socially and politically acceptable, and created a major problem for the Community as a whole.<sup>37</sup>

Thus in 1975 the Regional Development Fund was set up<sup>38</sup> to correct the principal regional imbalances within the Community, resulting in particular from the preponderance of agriculture in certain regions, industrial change and structural under-employment.<sup>39</sup> At the beginning of its existence the Fund had a number of limitations. Its establishment did not mean the foundation of a Community regional policy,<sup>40</sup> and the Fund performed its activity as a supplement to national state aid.<sup>41</sup> It is clearly expressed in art.3 of the Regulation setting up the Fund:

*Regions and areas which may benefit from the Fund shall be limited to those aided areas established by Member States in applying their systems of regional aids and in which State aids are granted which qualify for Fund assistance.*

*When aid from the Fund is granted, priority shall be given to investments in national priority areas ...*

The backwardness of some regions was accentuated from the middle of the 1980s, and the need emerged to identify the causes of the vicious cycle of regional deprivation

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remedy a serious disturbance in the economy of a Member State. The Treaty enumerates some other situations, less relevant from the point of view of regional development, where aid might be allowed.

<sup>37</sup> This recognition arose only with the Northern enlargement which increased regional imbalances. Generally speaking, regional policies can follow two main objectives: efficiency or equity. The former, the economic argument which intends to achieve the maximum efficiency, has been central at each stage of the development of European regional policy. The latter, the social argument, which wants to ensure some equity, has only gradually come into fore, until the mid-1980s neither the social dimension nor the public support for a fiscal contribution to assist regional development in a different Member State had developed much. (Molle, Willem: *The Economics of the European Integration: Theory, Practice, Policy* (1994) pp.432-433.)

<sup>38</sup> Regulation 724/75 OJ L73/1; 21.03.1975.

<sup>39</sup> art.1 of Reg. 724/75.

<sup>40</sup> Mathijssen, P.S.R.F.: *A Guide to European Union Law* (1995) p.335. Shanks' had the same opinion: A Fund is not a policy. The recognition of the necessity to establish a Fund to stimulate some development did not mean at the same time the elaboration of a policy. It can attract investment to regions in difficulty which might have gone elsewhere or can accelerate certain projects which might otherwise not have happened so quickly, or in some other cases not at all or. But its overall impact will be marginal. (Shanks, Michael: *European Social Policy; Today and Tomorrow* (1977) p.41.)

<sup>41</sup> The resources were distributed via a system of national quotas. (Allen, David: *Cohesion and Structural Adjustment* (1999) in: Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.222.)

and to find the right means to solve it. This process led to the reform of the Fund in 1984.<sup>42</sup> The economic argument continued to remain crucial, the main task of the Fund was to achieve a higher degree of convergence of the economies of the Member States. The scope of the Fund's activity became wider and more general, dropped the focus on agriculture, industrial change and structural underemployment and it introduced the *...participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.*<sup>43</sup>

The Commission gained a more important role in the co-ordination of regional policies, in fact it became responsible for a Community regional policy. National regional priorities were no longer dominant, the interest of the Community as a whole became decisive. The Regulation reforming the Regional Development Fund instituted a co-ordination mechanism between Community regional policy guidelines and priorities, on the one hand, and national regional policies on the other, and the Fund accordingly financed mainly Community programmes or national programmes of Community interest.<sup>44</sup>

Yet before the reform of the ERDF there were some initiatives intended to establish a kind of co-ordination between the existing structural provisions. From as early as the second half of the 1970s, there were proposals to develop a Community policy not only in the field of regional policy *per se*, but also in the area of employment policy. To underpin this statement with concrete data, one should not forget that more than half of the budget of the Social Fund was spent in the regions covered by the Regional Fund and

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<sup>42</sup> Regulation 1787/84 OJ L 169/1; 28.06.1984.

<sup>43</sup> art.3 of Reg. 1787/84. Then the Single European Act incorporated the same provision into the Treaty under art.130/c.

<sup>44</sup> It has to be added that the Commission has been very keen to safeguard the balance of state aid levels and to enforce the primacy of Community interest. It does so to prevent governments from outbidding one another with subsidies which would mean in practice that the wealthier Member States would be able to exceed any limits annulling Community aids in the poorer Member States. (see: Philip Morris Holland Bv v EC Commission (case 730/79) [1980] ECR 2671. The Philip Morris Company applied for state aid to raise its production in one of its two subsidiaries in the Netherlands and meanwhile it planned to close down the other branch. Although the Dutch government found the company in question to be eligible for state aid, the ECJ argued that market conditions in the cigarette manufacturing industry seemed to be healthy enough to ensure normal development without state intervention, and the need of the region was not justified either.)

in many other ways the two Funds were complementary.<sup>45</sup> The Regional Fund was designed to stimulate *demand* for jobs by subsidising investment. The Social Fund operated on the *supply* side by ensuring adequately trained workers in the appropriate locality.<sup>46</sup>

At the same time we have to add that the Social Fund, operating strictly on the basis prescribed for it by the Treaty, could not fully fulfil this complementary role. It had to undergo smaller reforms, to enlarge its field of activity and equip itself to tackle emerging needs. In the next section, this process will be discussed, with special attention to regional considerations.

### The enlarged role of the European Social Fund

Otto Dibelius summarising the evolution of the Fund writes: "Inevitably, it is at the cross-roads of a large number of divergent interests and periodically has to be adapted to the changing needs of the employment market. So its history is one of the reforms perennially geared to improving the performance of this Community instrument to make for a dynamic employment policy."<sup>47</sup> The effectiveness of the Fund is open to question, due to the initially strict Treaty base, and consequently its rather limited function. Some principles clearly limited the scope of its activity, such as the undoubted belief that the common market would bring about full employment and that the labour market would regulate itself without co-ordinated policy measures. At the end of the 1960s the worsening of the economic situation and the slow increase in unemployment prompted the European Parliament to urge the transformation of the Fund into a more efficient

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<sup>45</sup> One example of this complementary function is the aim of Regulation No 724/75 to help investment in industrial and service activities to create new jobs and to maintain existing ones; or to help investment in infrastructure directly linked to the development of the above mentioned activities.

<sup>46</sup> Consequently the two Funds could have operated in an integrated way. Shanks proposed a merger of them which might have meant the establishment of the Community Employment Fund. It could have been an instrument for a *Community* employment policy rather than a clumsy means of transferring money from one country to another. He argued that in the case of a single Fund, the Commission could have appeared as a more credible Fund manager since it would not be frittering away its limited management resources on separate but overlapping activities. (Shanks, Michael: *European Social Policy; Today and Tomorrow* (1977) pp.27-28.)

<sup>47</sup> The European Social Fund; Social Europe 2/1991. p.8.

Community employment policy instrument.<sup>48</sup> This happened in 1971,<sup>49</sup> and instead of its original role of compensation the Fund took on the task of reducing or preventing structural delays in regional development and in employment. The Commission advocated the reform with a great deal of enthusiasm; it was eager to shift the Fund from 'negative' to 'positive' issues and thereby help revive the faltering dynamics of European integration.<sup>50</sup>

The activity of the second Fund was based on Community interests, and the Commission gained a central role in managing the Fund. Financial assistance could reach private organisations and companies directly, and the Fund gained a separate chapter in the Community budget, putting an end to the horse-trading by the Member States. The tasks of the Fund became more general but at the same time better targeted. Instead of facilitating occupational and geographical migration with overly bureaucratic rules, the ESF provided four kinds of assistance:

- vocational training for those who needed to obtain, broaden, adapt or improve their knowledge or professional skills;
- help to facilitate the movement of workers and members of their families;
- assistance in removing barriers impeding some people's access to employment;
- help to promote employment in economically backward regions.

The interest of the Community as a whole now dominated, and the Fund could intervene if the employment situation was affected by or was under threat from Community policy or when common action was required to bring supply into line with demand in the Community labour market.<sup>51</sup> Member States realised that a proper answer to labour market problems involved a diversified range of measures. Short-term measures

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<sup>48</sup> European Parliament: Fundamental Problems of the European Community Policy; 03.11.1969.

<sup>49</sup> Council Decision No 71/66, OJ L 28, 04.02.71. For detailed analysis on the reform see: Stabenow, Wolfgang: *The European Social Fund* (1977) 14 Common Market Law Review pp.435-456.

<sup>50</sup> Teague, Paul: *The EC: The Social Dimension. Labour Market Policies for 1992* (1989) p.43.

<sup>51</sup> It is worth comparing this view with that of the Spaak Report. The Report rejected the idea that the Social Fund could intervene where unemployment might be the result of the common market itself. According to the philosophy of the Report, the Community was interested in progressive change in the industrial structure, in the rationalisation of undertakings and in better employment of the labour force; it was interested in all of these because they would increase productivity and improve standards of living. (Kahn-Freund, Otto: *Labour Law and Social Policy* (1960) in: Stein, E; and Nicholson, T. (eds): *American Enterprise in the European Common Market* p.354.)

alone would not result in efficient, Community-wide employment creation to rectify the qualitative and regional imbalances in the employment market. Structural measures were vital and they had to take account of medium and long-term trends in the Community's working population and of overall labour requirements in all economic activities in the various sectors, branches, regions.<sup>52</sup>

The substantive changes brought about by the second Fund, indicating the direction of future developments, were that not only has the Fund become a Community tool, but vocational training and promotion of employment in regions lagging behind in their development have gained crucial importance. 90% of the resources have been spent on training, and particular attention has been devoted to young school leavers and to the transition from school to work. Notwithstanding the better articulated operation of the Fund, the still worsening economic situation and crisis has brought about a huge increase in unemployment,<sup>53</sup> generating an ever-growing number of applications to the ESF and an attendant growing imbalance in its budget. The forthcoming amendments proposed by the Commission are designed, firstly, to eliminate some structural rigidities present in the functioning of the Fund, in order to transform it into a more flexible Community instrument of employment policy, and, secondly, as a consequence, to enlarge both the material and personal scope of the Fund.<sup>54</sup> A better co-ordination between the existing financial resources was also proposed in order to increase efficiency. Since the beginning of the 1980s, the conditions have been ripe for the next reform of the ESF.

The Decision of the Council in 1983 made possible the introduction of the third ESF.<sup>55</sup> Special emphasis was put on the implementation of policies aimed at improving job opportunities, especially through vocational training, and at reducing regional imbalances in the labour market. The main target groups were young people and the long-

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<sup>52</sup> Hatt, Philippe: *Thirty years of ESF assistance* (1991) p.83.

<sup>53</sup> The Community's unemployment rate until the beginning of the 1970s remained under 3% whereas in 1985 the registered rate was 10.8% (source: COM(93)700 p.55.)

<sup>54</sup> Pocar, Fausto: *Diritto comunitario del lavoro* (1983) Enciclopedia Giuridica del Lavoro, diretta da Prof. Mazzoni pp.227-228.

<sup>55</sup> Council Decision 83/516; OJ L 289/38; 22.10.83. Furthermore see Council Regulation 2950/83 on the implementation of the Decision 83/516 on the tasks of the European Social Fund OJ L 289; 22.10.83.

term unemployed. In order to concentrate the assistance in regions where the need was the greatest, categories of 'absolute' and 'ordinary' priority were established. The regions of absolute priority were chosen in light of the following factors: per capita GDP, unemployment rate, migratory balance and the structure of the regional economy.

This policy choice illustrates that, by this time, there was no longer the belief that the workings of the market would automatically solve social problems. Instead, the causes of disadvantage continued to mount up in certain regions. Although both the specific categories of people and the underprivileged regions were rightly identified, the solutions adopted treated the problems as if they were the same everywhere. By this time the Fund was no longer seen as a compensatory mechanism, and it looked more like an equalisation fund, since the way its assistance was managed left very little room for the structural activities that were intended to promote employment opportunities.<sup>56</sup> A further reform was needed to transform the Fund into a tool for redistribution and a real instrument of active labour market policy. The comprehensive reform of the Structural Funds in 1988 brought about by the Single European Act's incorporation of the provisions of economic and social cohesion, went far beyond the boundaries of the ESF. Ultimately, this was the reform which tried to put an end to the overlapping activities of the various Funds, by establishing a coherent framework.

The history of the European Social Fund between 1962 and 1988 illustrates how the original perspectives of the founding fathers of the Community had to come face to face with changing reality. The ESF began its operation in practically ideal conditions, when shortage of labour was more significant than unemployment. From the late 1960s the structure of employment began to change: not only did unemployment rise, but at the same time the employment rate rose, and more and more women wanted to work, thus contributing to the deterioration of the employment situation.<sup>57</sup> Then came the economic crisis caused by the oil-price shock, and the less positive effects of the European

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<sup>56</sup> Hatt, Philippe: *Thirty years of ESF assistance* (1991) p.90.

<sup>57</sup> At the end of the 1950s a large percentage of women of working age remained outside of the labour market. In Germany and in France almost half of the women worked, whereas in Belgium only a relatively small percentage of them. (source: Hatt, Philippe: *Thirty years of ESF assistance* (1991) p.79.)



integration process pushed some regions onto the economic periphery. All these circumstances forced the modification of the rules governing the ESF, to make it capable of providing a Community-wide assistance. But the history of the ESF tells us more: its evolution reflects the general process of how the importance given to and treatment of employment issues changed in the framework of a fundamentally economic integration process. And the history of the ESF reflects not only the fact that social issues could no longer be ignored, but it also points to the context in which this change occurred: the need to promote employment.

### The involvement of the social partners

In recalling the Final Communiqué of the Paris Summit, we have to bear in mind its conclusion that: "... it is essential to ensure the increased involvement of labour and management in the economic and social decisions of the Community." This statement is of interest in two respects. First in relation to the legislative initiatives under the heading of Participation of the Social Action Programme 1974-76, the initiatives concerning workers' rights to information and consultation at plant level. Secondly, in relation to the involvement of the social partners *de facto* in Community-level decision-making. This aspect of the Summit Conclusions requires further explanation.

The Community has had its own complex decision-making process since the Rome Treaty was signed. There was never any intention to modify this process to include new actors. The only remaining way to enable new voices to be heard was the *informal* way, with intervention either within the initial phase of the decision-making process, that is in the articulation of the Community initiatives, or in the final stage, namely in the voting procedure. The social partners opted for the first possibility, that is for the chance to intervene in the preparatory phase of the decision-making process.<sup>58</sup>

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<sup>58</sup> It has to be added that the Community established some forums for the representation of non-governmental interests. One of these is the Economic and Social Committee involving employers' and workers' representatives and representatives of general interest. The Committee functions on an advisory basis, but it represents such a large scale of interests that it is hardly able to articulate a common position which would help the decision-making process in a constructive way. Yet despite of the obvious weaknesses of the Committee stemming from its passive role and its limited representational basis it has retained its importance.

The fundamental interest of the social partners in influencing the preparation of Community initiatives coincides with a fundamental interest of the Commission. Although the Commission, like other European institutions, is surrounded by lobby groups and a great variety of interest groups, the social partners are granted special status with regard to all issues of industrial relations and of employment. When the Commission is invited to prepare a proposal for legislation or Community action, its staff have hardly any first hand information on the situation it wants to regulate or, in any event, to influence. Information has to be obtained from sources outside the Community bureaucracy. The Commission has to be able to publish a preparatory document, having determined the effect of the proposed action and evaluated its impact. In our field of scrutiny the best option is to refer to the social partners and to national experts.<sup>59</sup>

Apart from the general need to collect information, the Commission has other well-defined interests in collaborating with the social partners. Recalling Sandler's classification<sup>60</sup> an initial justification for this co-operation is to build grass roots support for Community initiatives in the Member States. The lack of exclusive competence makes the Community heavily dependent on Member States' co-operation in implementing and enforcing the legislative agenda. By providing the Community representatives of powerful national interests with a substantial role in its decision-making process, the EC is best able to persuade these groups to support the Community in its struggle to acquire additional power and resources from the Member States.<sup>61</sup>

<sup>59</sup> Blanpain also supports this way of practicing comparativism in labour law and industrial relations. He argues that the best way to reap the full benefits of the comparative method is the approach used by the EC: to start with national reports, written by national experts, prepared on the basis of a common outline; then on the basis of these reports a comparative report is written. Both the national reports as well as the general report are discussed by the members of the expert group. In so doing one can guarantee that the divergent national realities are understood and the explanation of trends and the nature of particular developments are clear. (Blanpain, Roger: *Comparative Labour Law and Industrial Relations* (1985) p.17.)

<sup>60</sup> Sandler, Andrew, L.: *Players and Process: The Evolution of Employment Law in the EEC* (1985) 7 *Comparative Labor Law* pp.15-17.

<sup>61</sup> In contrast, Simitis and Lyon-Caen argue that it is difficult to identify what social forces influence the legislative activity of the Community; to a large extent, its authorities and institutions are free from social pressure. (Simitis, Spiros and Lyon-Caen, Antoine: *Community Labour Law: A Critical Introduction to its History* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton p.3.)

Another reason why the Commission is open to co-operation is the premium placed on consensus in the decision-making process. It is better to negotiate and reconcile the various interests in due time than to face a strong opposition at a later phase of the process which might paralyse the legislation in question. Streeck and Schmitter, however, argue that the ability of the Commission to influence the structure of an organised group interest is low, as it cannot autonomously determine the range of policy issues that come under its jurisdiction. Consequently, organised interests have no choice other than to maintain a strong national base and cultivate established national channels of influence. A European interest group which wants to prevent a specific decision needs just one national government willing to veto the decision in the Council, frustrating even the most sophisticated lobbying efforts *vis-a-vis* the Commission.<sup>62</sup>

A further reason for the involvement of outside sources in the preparatory phase of decision-making is that since the SAP 1974-76, the Commission has remained faithful to the goal of furthering its employment law agenda. In order to do so, it has not only maintained regular contact with the representatives of workers and employers, but has actively encouraged the development of Community-level worker and employer organisations. Unless the social partners and the Commission are able to maintain a constructive dialogue on the Community's employment law agenda, the EC is unlikely to play a significant role in the central employment issue confronting the Community.<sup>63</sup>

The social partners also had to organise themselves if they wanted to be in a position to influence Community initiatives when they are first proposed. But acting in concert has proved to be difficult and the history of the co-operation between the social partners has had its own ups and downs. The ETUC (European Trade Union

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<sup>62</sup> Streeck, Wolfgang and Schmitter, Philippe, C.: *From National Corporatism to Transnational Pluralism: Organised Interests in the Single European Market* (1991) 19 Politics and Society pp.142-143. Generally speaking EC institutions make it much easier to block reforms than to enact them. (Leibfried, Stephan and Pierson, Paul: *Social Policy* (1999) in: Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.189.)

<sup>63</sup> Sandler, Andrew, L.: *Players and Process: The Evolution of Employment Law in the EEC* (1985) 7 Comparative Labor Law pp.16, 31.

Confederation), in particular, has successfully managed to unify national trade unions. The strong collective identity achieved since 1973 has made it possible for the ETUC to engage in intra-Community bargaining, to develop a single workers' position and then to negotiate with the Commission.

The other component of the social partners, the employers, recognised the benefits of lobbying at the Commission much earlier. The UNICE (Union of Industries of the European Communities) was founded in 1958 and played an important role in ridding the common market of obstacles to competition. Its members agreed that these efforts were worthwhile and that the EC should be given support to grow and to become a central force in European economic development. Besides UNICE there are a dozen other employers' organisations,<sup>64</sup> but to date no single organisation has emerged as the employers' representative at Community level. In fact, from the very beginning of the Community, employers have resisted being represented by a single Community-level institution because of the pressure such an organisation would be put under to engage in Community-level bargaining.<sup>65</sup>

After the initial informal steps to create the information net between the social partners and the Commission, constructive tripartite negotiations took place between the Commission, ETUC and UNICE in the framework of the Social Action Programme of 1974-76, and these negotiations helped to shape Directives such as the ones on collective dismissals and acquired rights. A new tripartite institution was also set up during the 1970s, the Standing Employment Committee, composed of Ministers of Labour, the social partners and the Commission, and was chaired by the president of the Council. The mandate of the Committee was to co-ordinate national employment policies to make them compatible with Community objectives, but national ministries were reluctant to help it reach this objective, arguing that employment should remain a national prerogative.<sup>66</sup>

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<sup>64</sup> E.g. COPA and COGECA represent the agricultural employers, the CEEP the public employers. The insurance and banking sector have four organisations, the CEA, the GCECEE, the ACSCI and the BFEC.

<sup>65</sup> Fiorai, Bruno: *Organizzazioni sindacali europee* (1996) in: Baylos-Grau, A; Caruso, B; D'Antona, M; Sciarra, S. (eds): *Dizionario di Diritto del Lavoro Comunitario* pp.196-197.

<sup>66</sup> Goetschy, Janine: *The European Employment Strategy: Genesis and Development* (1999) 5 European Journal of Industrial Relations p.118.

The UNICE was not entirely in favour of Community intervention in employment issues, and its relations with the Commission radically worsened as the Commission started to move into the employment area. The Commission faced a forceful opposition from the employers' organisation, which found a more effective means of enforcing its interests *vis-a-vis* national channels and ultimately through the Council. Then, since the middle of the 1980s, relations between the Commission and the employers' organisation started improving as the parties recognised that co-operation was everyone's interest. By that time employment was no longer concentrated in heavy industries represented by the UNICE and thus UNICE was no longer the dominant organisation. A co-ordination body of the major Community-level employer organisations was established: the Liaison Committee of Employers (CLE) and since then the relations with the Commission have been improving.

Reviewing the developments which took place in the Community during the 1970s, one can witness the growing importance of political influence and informal interest enforcement. The commitments laid down in the Paris Conclusions necessitated a shift in the form of implementation, they required recourse to policy instruments. This was so because the heads of states and governments decided to deviate from the itinerary of the integration process, but did not want to amend the Treaty. Although the new commitments were backed up by high level political support, their implementation required further promotional activity. The foundation of this promotional activity is twofold. The first is the articulation of policy initiatives targeted at the social consequences of economic integration. These initiatives could not be practically sound unless formulated with the participation of those they were designed to benefit. The second consideration is strictly linked to the first one: if these initiatives were not sufficiently secured by legal means their implementation would require the active support of the social partners at national, industry and even plant level. In fact this feature is not alien to labour law. Generally speaking, in all EC countries agreements between the social partners enjoy significant or in some countries even a crucial role. State-imposed law is complemented by

autonomous law. Labour relations in everyday life are governed by norms which are binding with the force of law, but also by rules whose legal status is uncertain, their only 'source' and legitimisation stemming from the behaviour of employers and employees. These informal rules make up an important part of working life.<sup>67</sup>

To summarise, beyond the procedural developments, substantive results can also be attributed to this period of the European integration process. The SAP 1974-76 gave birth to the first labour law directives and the fact that they were embedded within an economic framework does not deprive them of their importance. Labour market regulation and structural intervention gained a more tangible shape as well: through the establishment and the reform of the ERDF, and through the reforms of the ESF vulnerable regions and groups were assisted by Community resources. The growing influence of the social partners in the articulation of Community policies anticipates a multi-level, multi-actor dialogue to shape Community initiatives for the mutual benefit of all participants. Still, the fundamental lesson to bear in mind relates to the limits of any initiative on a political basis without a stable legal foundation. It is not clear that political support is sufficiently firm to sustain policies unless they are transformed into institutions or binding instruments.

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<sup>67</sup> Daubler, Wolfgang: *Instruments of EC Labour Law* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton p.151.

## Chapter III

### THE SINGLE EUROPEAN ACT "SUR LA DIMENSION SOCIALE, NOUS SOMMES EN PLEIN MALENTENDU"

In the middle of the 1980s the Community gained new energy and launched the next phase of integration. This phase was dominated by the personality of Jacques Delors as the President of the Commission and by his White Paper on the completion of the Internal Market.<sup>1</sup> This new impetus had an impact on the legal construction of the Community and, following an Intergovernmental Conference, the Rome Treaty was amended for the first time, by the Single European Act.<sup>2</sup> Of relevance to our principal field of scrutiny, besides the completion of the internal market, a new category appeared on the scene: the social dimension of the internal market. Although the role of a broader social dimension in the creation of the internal market is not explicit in the Treaty and in fact the thrust of the SEA is unequivocally economic,<sup>3</sup> by adopting a narrow frame of reference, we can explore a fragile net of pathways built on the previously identified sources which aided the development of the Community social dimension.

Before embarking on the discussion, the most famous declaration of the era, Delors' announcement should be recalled: "the creation of a vast economic area, based on market and business co-operation, is inconceivable -I would say unattainable- without some harmonisation of social legislation. Our ultimate aim must be the creation of a European social area." This enthusiastic declaration does not say too much in real terms beyond its rhetorical importance: it does not say anything properly about the relationship between the economic and social spheres, it does not clarify the meaning of

<sup>1</sup> COM(85)310. Completing the Internal Market; White Paper from the Commission to the European Council (Milan, 28 and 29 June 1985)

<sup>2</sup> OJ L 169, 29.06.1987.

<sup>3</sup> Addison, John T. and Siebert, W. Stanley: *The Social Charter of the European Community; Evolution and Controversies* (1991) Industrial and Labour Relations Review p.598.

harmonisation. From this statement one can deduce only a strong commitment to confer more importance on the social consequences of market integration; and this is reflected in the rest of the declaration as well: "The idea, may I remind you, was rejected as Utopian, dangerous, and irrelevant to the Community venture a few years ago. Today its purpose is clear: to ensure that economic and social progress go hand in hand"<sup>4</sup>

In this chapter our main purpose is to decode the message of Delors' speech, more precisely to identify in the Treaty text and in Community initiatives the realisation of the "harmonisation of social legislation" and the "creation of a European social area". We want to pinpoint the fundamental changes which were accentuated during this period of time and formulate a value judgement, and for this purpose a large number of documents have to be analysed and opinions taken into consideration.

The above declaration of Delors was cited from his speech at the signing of the Single European Act. It is worthwhile recalling some of the immediate reactions to the progress achieved by the SEA. In fact none of the Community institutions was fully satisfied with the final document.<sup>5</sup> Hans Van den Broek, as the president of the Council, condescended to mention that the three main achievements of the SEA were: first the completion of the free market which finally made the European dimension a reality for citizens and constituted a factor in economic dynamism and prosperity; secondly the Community's decision-making power was strengthened by the extension of qualified majority voting; and thirdly the requisite solidarity now existed between the Member States, and the instruments relevant for this purpose, namely the Structural Funds, were given their rightful place in the Treaty. Frans Andriessen, as vice-president of the Commission, expressed his disappointment in general that the measures contained in the Act fell far short of their hopes, but he underlined that the main goal was to increase efficiency, and majority voting had been accepted in areas which were to form the basis for revitalising the Community. By contrast, Siegert Alber, vice-president of the European

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<sup>4</sup> Bulletin of the EC, 2-1986. p.12.

<sup>5</sup> Of the Member States, Italy, Greece and Denmark signed the SEA later than the others and the Italians in particular were unhappy with the outcome of the Intergovernmental Conference, arguing that the Act was merely a partial and unsatisfactory response to the need for substantial progress.



Parliament pointed out that the most important matters still required unanimity. The Parliament was not satisfied, since, in its opinion, the Act was unable to remedy the shortfall in European democracy: European law was still made by officials and the Parliament had not been granted genuine influence over the decision-making process.<sup>6</sup>

We can add some further comments to those immediate reactions cited above. These focus more on the social promises made on the eve of the SEA, than on the evaluation of the general process as a whole. Bob Hepple states that those who place their faith in the future of EEC labour law in the Single European Act are likely to be disappointed.<sup>7</sup> Paul Teague suggests that a good deal of confusion existed about the policy implications of the idea of a European social area.<sup>8</sup> Even Jacques Delors concluded that: *Sur la dimension sociale, nous sommes en plein malentendu.*<sup>9</sup>

To better understand the comments just cited, it is necessary to refer to a few documents closely related to the Single European Act. Among these one can find the only attempt of the Commission to define the social dimension of the internal market. This definition gives us important insights into the main direction of subsequent developments. Then, examining the newly incorporated provisions of the Treaty, special attention will be focused on: art.118/a; 118/b, and art.130/a-e on social and economic cohesion. The resulting analysis leads one to the emergence of soft law. Soft law is not a specific creation of labour law or social policy, but is deeply embedded in European constitutional and administrative law, as well as in legal theory and public international law. However, it has an ever-growing importance in our field of scrutiny thus we cannot avoid referring to some fundamental statements on this concept. The conclusions to this chapter confirm that the SEA followed that pattern of development which first became apparent around the 1974-76 Social Action Programme, in a context corresponding to and embedded in the Rome Treaty's economic orientation. The SEA laid down important milestones regarding the history of the social dimension but still reflects the fact that political will has remained

<sup>6</sup> Bulletin of the EC 2-1986. pp.7-12.

<sup>7</sup> Hepple, Bob: *The Crisis in EEC Labour Law* (1987) 16 Industrial Law Journal p.83.

<sup>8</sup> Teague, Paul: *The EC: The Social Dimension; Labour Market Policies for 1992* (1989) p.68.

<sup>9</sup> see in: Vogel-Polsky, Eliane and Vogel, Jean: *L'Europe sociale 1993: Illusion, alibi ou réalité?* (1991) p.13.

as important to the development of the social dimension as it was at the time of the Paris Summit of 1972 and the subsequent Social Action Programme. And the crucial role of political will made the whole system fragile and dependent on the actual political balance.

### The path to the Single European Act

The most important aid in the interpretation of the SEA is provided by its main preparatory document, the Delors' White Paper.<sup>10</sup> The White Paper speaks almost exclusively about the abolition of physical, technical and fiscal barriers to free movement. Only two points mention the social consequences of the economic process. The Commission intends to pursue a dialogue with governments and social partners to ensure that the opportunities afforded by the completion of the internal market will be accompanied by appropriate measures aimed at fulfilling the Community's employment and social security objectives. The other reference in the White Paper is more tangible: it reflects the fact that the Commission is conscious that there may be risks that, by increasing the possibilities for human, material and financial services to move without obstacle to the areas of greatest economic advantage, existing discrepancies between regions could be exacerbated and therefore the objective of convergence jeopardised. This means that full and imaginative use will need to be made of the resources available through the Structural Funds. The importance of the Funds will therefore be enhanced.

As a counterbalance to the preponderance of the market, another document has to be recalled, namely the Conclusions of the Council concerning a Community medium-term social action programme.<sup>11</sup> Already in 1984, before the publication of the Delors' White Paper the Council had committed itself to the gradual promotion of a European social area. The document made clear that the Community would not be able to strengthen

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<sup>10</sup> COM(85)310 Completing the Internal Market; White Paper from the Commission to the European Council (Milan, 28 and 29 June) points 20, 21. The Cecchini Report, the preparatory report of the single market programme was extremely optimistic regarding its benefits. It forecast a long-term non-inflationary economic growth, 1.8 million new jobs and a rate of unemployment of 1.5%. The authors of the Report were convinced that the costs of non-Europe would far exceed the initial costs of the creation of the single market and of the compensation of certain regions and societal groups. (The Report was then published: Cecchini, Paolo: *The European Challenge, 1992: The Benefits of the Single Market* (1988)).

<sup>11</sup> OJ C 175; 04.07.1984.

its economic cohesion in the face of international competition if it did not strengthen its social cohesion at the same time. Social policy must therefore be developed at Community level on the same basis as economic, monetary and industrial policy. Referring to the interrelationship between the different policy spheres, the Council Conclusions underline that, on the one hand, the success of a proper economic policy is an essential *requirement* for the implementation of an adequate social policy. On the other hand, an effective social policy is a necessary *support* for economic policy.<sup>12</sup> The Council document describes the main objectives of social policy: to seek full and better employment, to improve living and working conditions and to realise the full and free circulation of workers. The objectives of social policy are inseparable from the search for stronger economic growth based on more competitive undertakings and the Community must help to strengthen the links between economic and social policies so as to boost its competitiveness and its solidarity *vis-a-vis* the outside world.

Though the two documents (the Delors White Paper and the Council Conclusions) have different titles, it is not necessary to contrast them as they are complementary to each other. The EC continues its development along the previously agreed lines: the creation of a common, then internal market which endeavours to promote European competitiveness. Every other aim and policy is subordinated to this commitment. What is the new element in this old approach is the full recognition that if a boost is given to Community action in the social field, and a greater emphasis is put on the social consequences of the market integration, they can support the attainment of economic goals.<sup>13</sup> The commitment is first of all political and it is underlined in the Council's Conclusions: the Community wishes to assert its political determination to make progress in the construction of a European social area.<sup>14</sup> The next step is to convert this political determination into a legal instrument which can be the means to bring about the realisation of this aim. This step was taken by

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<sup>12</sup> emphasis added.

<sup>13</sup> Lo Faro argues that: "Since that time [the 1970s] much has occurred but the situation has remained essentially the same. The Single European Act, which intervened in integrating the Treaty in 1986, has basically maintained the former philosophy although it has shown greater concern and awareness of the social dimension." (Lo Faro, Antonio: *EC Social Policy and 1993: The Dark Side of the European Integration?* (1992) 14 Comparative Labor Law Journal p.7.)

<sup>14</sup> OJ C 175; 04.07.1984. 8th consideration of the Preamble.

the signing of the Single European Act, which, as Hans Van den Broek argued, "has opened up avenues which we must now strike out on with determination. It is first and foremost an instrument in the service of political will, which, I am convinced, will not falter at the critical moment."<sup>15</sup>

It is now necessary to examine how these commitments were intended to be implemented by the Commission. The first document to consider is the Commission's publication on the Social Dimension of the Internal Market.<sup>16</sup> Although the document seems to be the most appropriate source to provide a precise definition of the social dimension and suggestions for implementation, it leaves big *lacunae* in this respect. What it provides instead is more a collection of aspects of the social dimension, elements without clear limits. Yet the document fulfils a very important role.

The Commission's document underlines that, first of all, there are two expressions to be distinguished: the social dimension of the internal market which should not be confused with the concept of 'imparting a social dimension to the Community', though this latter helps to define certain aspects of the former. On the concept of "imparting a social dimension to the Community" the document is elusive, it does not provide any definition or conceptualisation. In contrast, regarding the "social dimension of the internal market," the document puts forward several suggestions, but again, no definition: (a) genuine freedom of movement of persons within the Community; (b) the social aspects of the provisions contributing to the completion of the internal market (e.g. standards, company law, etc.); (c) social changes which will be triggered or speeded up by the completion of the internal market: their anticipation, measures to cope with them. Then some other aspects are added which are not dealt with in that particular document but nevertheless form part of the social dimension. These are among others: the reform of the Structural Funds, art.118/a, various topics related to the adaptability of the labour market. As a conclusion the document notes that the social dimension of the internal market goes

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<sup>15</sup> Bulletin of the EC 2-1986. p.8.

<sup>16</sup> Social Europe, Special edition, 1988.

beyond industrial relations and, in part, it also concerns consumer policy, family policy, etc.<sup>17</sup>

In commenting on the Commission's document, it is important to note that there are two concepts, and the distinction has to be underlined: the social dimension of the internal market, and the social dimension of the Community. The social dimension of the internal market was first identified by the documents preparing for the Single European Act and its implementation. The timing is crucial because this was the moment when social objectives themselves became a goal, although not an independent one, but, nevertheless, an indispensable support to the completion of the internal market. At this point it was clear that the former role of social policy, namely as a simple by-product of economic integration, was now superseded.

As it is very often the case, behind the new label there are much deeper roots. The initiatives based on the SEA are not without precedents<sup>18</sup> and those programmes and activities which had begun earlier, now gained a more solid support from the new political climate and from the modification of the Treaty.<sup>19</sup> Thus the category of 'social dimension of the internal market' so far described, has to be enlarged to include its origins. In other words, a retroactive nature has to be attributed to the category born in the SEA and in this context can we speak about **the social dimension of the Community**. Consequently all the initiatives, programmes and, legal measures which can be traced back to art.48-51 (free movement of workers); arts.117, 118, 118/a, 118/b, 119 and to the provisions related to the ESF and to the economic and social cohesion, belong to the social dimension of the Community.<sup>20</sup>

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<sup>17</sup> The social dimension of the internal market; Social Europe, Special edition, 1988. p.15.

<sup>18</sup> As an example, the development of the ESF or of the ERDF can be mentioned.

<sup>19</sup> E.g. the Social Action Programme of 1974-76 already contained initiatives on health and safety. This process gained a new impetus from art.118/a.

<sup>20</sup> However, at the same time this categorisation does not, and cannot, mean a closed definition: no one can deny the interaction with education, family policies, etc., but these policies have their autonomous area of operation. This interaction makes the examination of the social dimension more complicated.

Properly categorising the social dimension first of all requires one to trace the history of its development: historically, the path taken has been that of the labour market, which has had to be restructured to conform to economic requirements, at best, it has meant the protection of labour market actors, but not citizens. This limitation is crucial when compared to the definition of a national social dimension: the national concept is based on citizenship, whereas the Community concept and competence are tied to the world of work. In other words, in European Community parlance, the term 'social policy' has very largely come to mean 'employment-related social policy'. The use of this terminology has the result that the body of policy upon which the employment-related legislative, administrative, and judicial activity of the European Community is based has tended to be described as social policy rather than employment policy.<sup>21</sup>

In the following sections we will examine whether the institutional answers provided by the SEA correspond to our theoretical speculations.

#### Articles 118/a and 118/b

The introduction into art.118/a to the Treaty brought along innovations, although these innovations are not without question marks.

*Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.*

First of all the newly inserted article assigns a new competence to the Community in the social field, more precisely we can speak about a competence over labour law. It creates a clear power to regulate this particular part of the social field in contrast to art.118, which delegated no legislative power to Community organs. This achievement gains its real significance when compared to the SAP 1974-76 directives, which in the absence of a specific legal basis, had to be based on art.100.

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<sup>21</sup> Freedland, Mark: *Employment Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.277.

Probably the most significant, almost revolutionary, innovation of the SEA was the extension of qualified majority voting in the Council after the near-exclusive application of unanimity voting. The shadow of majority voting extends beyond the boundaries of art.118/a, as Dehousse remarks: "Even if majority voting in the Council of Ministers remains to a large extent an exception, the possibility that a vote will be taken has had a decisive impact on decision-making. Instead of negotiating in the shadow of a veto, Member States very often have to negotiate while keeping in mind the possibility of being outvoted, should a vote be taken."<sup>22</sup>

However, some argue that art.118/a is an optical illusion.<sup>23</sup> Watson, for example, states that the international regulation of welfare standards is tolerated only to the extent necessary to ensure equality of economic opportunity for undertakings.<sup>24</sup> Leibfried and Pierson, underlying the role of competition, stress that with the Single European Act EC regulation moved beyond the regulation of *products* to the regulation of production *processes*, where the concerns about barriers to trade would seem inapplicable.<sup>25</sup> However, nobody can deny that welfare considerations strengthened their position by art.118/a even if this was in part due to competition concerns.

There is much discussion in the literature regarding the material scope of this provision. It is difficult to decide whether legislation can be based on art.118/a only in

<sup>22</sup> Dehousse, Renaud: *Integration v. Regulation? Social Regulation in the European Community* (1992) p.17. Weiler comments that through the extension of majority voting, the relationship between the Member States and the Court of Justice has changed significantly. Earlier the Member States opposing any legislation could have recourse to a veto; after the Single European Act, when a decision can be taken by qualified majority the unhappy Member State can challenge it before the Court of Justice. But it is not certain that the applicant Member State will be satisfied with the judgment delivered by the Court. Weiler describes the situation as follows: "The honeymoon is, [between the Member States and the Court] I think, at an end, and though no divorce is predicted, it will be the ups and downs of a mature marriage which henceforth will characterize the relationship." (Weiler, Joseph H.H.: *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration* (1993) 31 *Journal of Common Market Studies* p.434.)

<sup>23</sup> Sciarra, Silvana: *European Social Policy and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law* p.317.

<sup>24</sup> Watson, Philippa: *The Community Social Charter* (1991) 28 *CMLReview* p.41.

<sup>25</sup> Leibfried, Stephan and Pierson, Paul: *Social Policy* (1999) in Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.190.

relation to the health and safety of workers, or whether it can be extended to the working environment more generally. In fact it was only the Parliament which favoured a broad interpretation, to include all the conditions which might affect health and safety, with the Commission and the Council being more cautious.<sup>26</sup>

This cautiousness of the Commission and of the Council was justified by a contradiction forcing labour lawyers into interpretative acrobatics.<sup>27</sup> The Single European Act introduced art.100/a as well, besides art.118/a. Although art.100/a requires qualified majority voting for the adoption of measures which have as their object the establishment and functioning of the internal market, it maintains the unanimity rule in case of measures affecting the free movement of workers and relating to the rights and interests of employed persons (art.100/a(2)). The categories of health and safety (and that of working environment) on the one hand, and of the rights and interests of employed persons, on the other, overlap, consequently the decision-making procedure to be applied largely depends on the actual interpretation. According to the widespread and generally accepted analysis, there are at least three ways in which art.118/a can be interpreted:<sup>28</sup>

- as being limited to the protection of work in the strictest sense;
- as including all conditions of work which have or could have an effect on the health and safety of workers, including duration of work, its organisation and its content (so as to cover, for example, night work and various forms of 'atypical' work);
- as including working conditions in the widest sense of the term, as well as occupational accidents and illness and protection of health at the workplace.

Similarly, art.100/a can be interpreted along the same lines,<sup>29</sup> and ultimately which of these interpretations is adopted depends largely upon the momentary political power

<sup>26</sup> Majone, Giandomenico: *The EC between Social Policy and Social Regulation* (1993) 31 *Journal of Common Market Studies* p.155.

<sup>27</sup> Sciarra, Silvana: *European Social Policy and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law* p.317.

<sup>28</sup> Bercusson, Brian: *Fundamental Social and Economic Rights in the EC* (1991) in: Cassese, Clapham, Weiler (eds): *European Union -The Human Rights Challenge Vol.II.* p.204-206. (manuscript publication: 1989, EUJ); Bercusson, Brian: *European Labour Law* (1996) pp.68-71. Cited amongst others by Vogel-Polsky, Eliane: *What Future is There for a Social Europe following the Strasbourg Summit?* (1990) 19 *Industrial Law Journal* pp.70-72. Hepple, Bob: *The Implementation of the Community Charter of Fundamental Social Rights* (1990) 53 *Modern Law Review* pp.647-48.

<sup>29</sup> In the Council unanimity might be required:



balance. It is generally known that in practice, the British government blocked any kind of legislation which went beyond the category of workplace health and safety in the strict sense.

Paragraphs (2) and (3) of art.118/a provide further insights into the innovations of the SEA:

*(2) In order to help achieve the objective laid down in the first paragraph, the Council, acting by qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.*

*Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings.*

*(3) The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.*

The thrust of these provisions is that the Community apparently has to limit itself to the enactment of minimum requirements, in other words the directives will most likely take the lowest common denominator approach. Although these minimum standards cannot place extra burdens on small and medium sized undertakings, Member States are free to impose higher standards. In this case the Community minimum requirements might serve as a common floor, though it has to be seen what kind of protection they can provide. In these provisions some see an early example of the subsidiarity principle.<sup>30</sup> However, notwithstanding all these ambiguities, extensive regulations have generally

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- only for those proposals concerning solely the rights and interests of employees alone;  
- those proposals which predominantly (though not exclusively) are concerned with employees' rights and interests; or  
- any proposal, however partially and indirectly concerned with employees' rights and interests.

<sup>30</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy, Essays in Memory of Malcolm Mead* p.31.

produced quite a high level of standards<sup>31</sup> and there is no doubt that the health and safety legislation has become one of the strongest pillars of the social dimension.

A reading of art.118/a, partly suggested above, can be that Member States have free rein regarding the implementation of workplace health and safety standards beyond the common core of minimum requirements. In this process the social partners can have an important role according to the national traditions. This approach corresponds to Delors' vision, in that he proposed the realisation of the European social area and the harmonisation of social legislation not in the traditional supranational form, but by developing a dialogue between the social partners and the Commission.<sup>32</sup> This would lead to the convergence of objectives and policies which could be implemented within the Member States' existing industrial relations framework.<sup>33</sup> Art.118/b, incorporated in the Treaty by the Single European Act gains significance in this context:

*The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.*

However, art.118/b does not confer any specific power on the social partners, or on the Commission to act. The notion of social dialogue is very vague: it implies a loose relationship between the parties, without envisaging any duty to bargain; the Commission is not an intruder, but simply favours the dialogue, without imposing it on management and labour.<sup>34</sup> As outlined in the previous chapter, the dialogue between the social partners

<sup>31</sup> Leibfried, Stephan and Pierson, Paul: *Social Policy* (1999) in Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.190.

<sup>32</sup> The significance of Delors' plan in this respect was the retreat from the monolithic harmonisation of the 1970s and the promotion of common principles and objectives giving free rein to the Member States in the phase of implementation. (Teague, Paul: *The EC: The Social Dimension; Labour Market Policies for 1992* (1989) pp.69-70.) However, critics do not neglect on the practical realisation of this approach: The existence of autonomous national labour law systems makes transnational regulation unviable unless it is extremely flexible. In this respect the Single European Act raises more questions than it answers. (Rhodes, Martin: *The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe* (1992) 30 *Journal of Common Market Studies* p.27.)

<sup>33</sup> Nielsen, Ruth and Szyszczak, Erika: *The Social Dimension of the European Community* (1991) p.32.

<sup>34</sup> Sciarra, Silvana: *European Social Policy and Labour Law -Challenges and Perspectives* (1995) in: Academy of European Law (ed): *Collected Courses of the Academy of European Law* pp.317-318. Weiss goes one step further: "The institutional incorporation of the social dialogue to the Treaty under art.118/b did

and with the Commission slowed down considerably during the 1980s. Although Delors was successful in getting formal backing in the Treaty for European level social dialogue initiated by him, the Val Duchesse talks never went beyond non-binding joint opinions because of the employers' refusal.<sup>35</sup> Although commitments were reached at the highest political level, the practical conditions did not seem ready for the realisation of a Europe-wide system of collective bargaining, nor did the incorporation of such a vague provision contribute to the improvement of the situation.<sup>36</sup>

### The economic and social cohesion

Art.118/a provided a new, yet limited, competence over workplace health and safety; however, art.118/b, with its vague wording, could not do much to promote the social dialogue. It remains to be seen whether the third innovation of the SEA, the provisions on economic and social cohesion, can serve as a solid comprehensive basis for the social dimension, and if so, under what conditions.

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not resolve the problem, the function of the social dialogue remained unclear." (Weiss, Manfred: *The Significance of Maastricht for European Community Social Policy* (1992) 8 IJCLLR pp.5-6.)

<sup>35</sup> Falkner, Gerda: *European Social Policy; Towards multi-level and multi-actor governance* (1999) in: Kohler-Koch, B. and Eising, R. (eds): *The Transformation of Governance in the European Union* p.86. Vogel-Polsky summarises the situation as follows. "The 1991 *status quo* looked like as: The social dialogue on European level was launched but it developed only formally deprived from autonomy and proper dynamics and the result of such a dialogue was the pure formulation of common declarations without binding force and relating only to marginal sectors of the society." (Vogel-Polsky, Eliane: *Quale futuro per una politica sociale europea?* (1991) 5 Lavoro e Diritto p.338.)

<sup>36</sup> A Europe-wide system of collective bargaining remains an unlikely immediate outcome of the continuing effort to complete the internal market. Nonetheless, if successful, the 1992 project will most likely create the necessary preconditions for labour to attain Europe-wide trade unionism in the longrun through direct means. Though trade union leaders on both Community and national level were aware of the prematurity of the conditions to accomplish the aim, they also recognised that they had no choice but to attempt to make progress at the moment when states and social actors were reformulating the structure and significance of their relationship because a comparable opportunity might not arise again for years. (Silvia, Stephen J.: *The Social Charter of the EC: A Defeat for European Labour* (1991) *Industrial and Labour Relations Review* p.641.) Treu expressed a similar opinion: "Neither the social partners nor the Community organs invested enough resources and energy to achieve results convertible in harmonisation." (Treu, Tiziano: *L'Europa Sociale: dall'Atto Unico a Maastricht* (1991) *Quaderni di Diritto del Lavoro e delle Relazioni Industriali* No.10. p.16.) Some pessimism is reflected in the following statement: "Prospects for European collective bargaining are almost non-existent. Trade unions do not have enough power at European level to enforce the employers' associations and multinational groups to meet around the bargaining table." (Blanpain, Roger: *1992 and beyond: The Impact of the European Community on the Labour Law Systems of the Member Countries* (1990) *Comparative Labor Law Journal* pp.408-409.)

Delors and his Commission were convinced that the realisation of the internal market could not be successful without a broad social consensus. The reluctance of important actors of the labour market to co-operate, a reluctance which can emerge as a consequence of the opening up of a bigger market without regulation and without accompanying social measures, can easily destabilise the whole plan of 1992.<sup>37</sup> These accompanying social measures were intended in terms of the enhanced activity of the Structural Funds as already envisaged by the White Paper on the completion of the internal market. The practical implementation of this commitment took place under the label of economic and social cohesion (art.130/a-e).<sup>38</sup>

The idea behind this new expression is rather mysterious, it evokes an inseparable relationship, almost a symbiosis between the economic and social spheres, an

<sup>37</sup> Vogel-Polsky, Eliane and Vogel, Jean: *L'Europe social 1993: Illusion, alibi ou réalité?* (1991) p.7.

<sup>38</sup> On the basis of art.130/d the Council adopted a Framework Regulation on the Structural Funds (Regulation 2052/88; OJ L 185; 15.07.1988. In addition, separate Regulations were adopted in relation to each of the Funds: Regulation 4253/88 on the European Investment Bank (EIB) and other financial means; Regulation 4254/88 on the European Regional Development Fund (ERDF); Regulation 4255/88 on the European Social Fund (ESF); Regulation 4256/88 on the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance section. OJ L 374; 31.12.1988.) defining the tasks, priority objectives and the organisation of the Structural Funds in order to realise the cohesion. To achieve a coherence between the interventions of the various Funds, the Framework Regulation set out 5 priority objectives:

1. Promoting the development and structural adjustment of those regions whose development is lagging behind; 2. Converting the regions, frontier regions or parts of regions (including employment areas and urban communities) seriously affected by industrial decline; 3. Combating long-term unemployment; 4. Facilitating the occupational integration of young people; 5. a/ Speeding up the adjustment of agricultural structures, b/ Promoting the development of rural areas.

Reg.2052/88 was replaced by Reg.2081/93 (OJ L 193; 31.07.1993.) following the amendment of the Treaty at Maastricht. Among the priority objectives the first two have remained unchanged, the third and the fourth were merged: Combating long-term unemployment and facilitating the integration into working life of young people and of persons exposed to exclusion from the labour market. A new obj.4 was inserted: Facilitating the adaptation of workers of either sex to industrial changes and to changes in production systems. Obj.5 was modified to a certain extent: a/ Speeding up the adjustment of agricultural structures in the framework of the reform of the common agricultural policy; b/ Facilitating the development and structural adjustment of rural areas. Following the general review of the common fisheries policy the measures for the adjustment of fisheries structures came under obj.5/a. After the accession of the Nordic countries in 1995 obj.6 was added to promote the development of regions where the population density is extremely low. (General Report of the Commission, 1995; point 317.) The tasks of the various Funds were primarily distributed according to the priority objectives, but one Fund could intervene under more objectives as well. Objectives 1 and 2 belonged primarily to the ERDF, Obj.3 and 4 to the ESF and Obj.5 to the EAGGF. However, the ESF could support programmes in Obj.2 regions as well in co-ordination with the support of the ERDF. After the Agenda 2000 the number of priority objectives was decreased, Obj.1 and 2 remained as regional objectives and Obj.3 became a horizontal one. All those activities belong here which are intended to achieve structural interventions on the labour market. The most important Regulations in force are the following: 1260/1999 on the Structural Funds; 1261/1999 on the European Regional Development Fund; and 1262/1999 on the European Social Fund. All: OJ L 161; 26.06.1999.

interpretation which reflects the intention of the Commission. However, a more substantial definition puts the more problematic side of the phenomenon under the spotlight. Molle argues that: "the cohesion is the degree to which disparities in social and economic welfare between different regions or groups within the Community are practically and socially tolerable. At this point it is clear that cohesion is to a large extent a political question."<sup>39</sup> Watson points out that the Community seemed to aspire to its own social policy, indeed it appeared to regard such a policy as an essential element in realising the single integrated market. The creation of the social dimension to the internal market was necessary to overcome potential regional disparities and distortions in competition which might give rise to social dumping.<sup>40</sup>

Although the Commission's working programme for 1985 stated that the realisation of the internal market must be accompanied by the creation and the organisation of a European social area,<sup>41</sup> Jean Vogel states that during the negotiation of the SEA, the content of such an area was quickly eroded. According to Delors' intention, it would have possessed the same importance as the realisation of the internal market, but then the idea that social policy should be developed to the same level as economic policies lost its impetus, and what remained is an auxiliary and subordinated role. Vogel demarcates the position of the social area as follows: the 'area', is synonymous with the market, the 'social' is a dimension of an economic space.<sup>42</sup> Later, in the same academic work, the co-author, Eliane Vogel-Polsky comments that art.130/a<sup>43</sup> does not say more than art.2 of the Rome Treaty did in 1957.<sup>44</sup>

<sup>39</sup> Molle, Willem: *The Economics of the European Integration; Theory, Practice, Policy* (1994) p.421.

<sup>40</sup> Watson, Philippa: *The Community Social Charter* (1991) 28 CMLReview p.42.

<sup>41</sup> Bulletin of the EC, supplement 4/85. Working Programme of the Commission, par.56;

<sup>42</sup> "L'espace, c'est le marché; le social est une dimension d'un espace économique." In fact the relation between the planned social area and other policies is not very clear. On p.7. the author states that the Commission and Delors had always subordinated the social dimension to the promotion of economic, industrial and financial integration. Then, on p.14 he argues, as quoted above, that the issues promoting the social dimension lost their equal importance *vis-à-vis* the economic ones during the negotiation of the Single European Act. However, the author himself confesses that as far as the definition of aims, the precise outlining of means and their articulation, are concerned there is a great deal of confusion which dominates the formulation of various projects and strategies constructing the social dimension (Vogel-Polsky, Eliane and Vogel, Jean: *L'Europe social 1993: Illusion, alibi ou réalité?* (1991) pp.7, 14.).

<sup>43</sup> Art.130/a: *In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.*

However, scholars are divided over the evaluation of the new provisions. On the opposite side, Jacobs and Zeijen argue that art.130/a can be regarded as a departure from the old neo-liberal ideas of the 1950s which largely saw social policy as a secondary field of action. One also senses in this article an idea of solidarity among the Member States of the EC: that the richer countries should assist the poorer ones to make up for their lesser development. But the implementation of this nice phrase is completely dependent upon the daily conduct of policies.<sup>45</sup>

Other commentators concentrate more on the relation between regional policies and economic and social cohesion. Mathijssen states that economic and social cohesion mainly concerns regional policy,<sup>46</sup> Jean De Ruyt points out that the second sentence of art.130/a could be found in the Preamble of the Rome Treaty.<sup>47</sup> The issue requires a fine tuning instead of a simple declarations. The Preamble reads as follows:

*[the Member States are] ... anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions.*

Although the wording of the two phrases are in fact similar, their content has to be analysed in the appropriate context. At the time of the Rome Treaty there was no means to implement a regional policy, whereas for the time when the Single European Act was adopted, not only had a Regional Development Fund been institutionalised, but through its reform in 1984, the Community had gained a regional policy. A stated aim of reducing differences in regional development does not mean the elaboration of a policy; behind the similar wordings there were different realities, thus the provisions cannot be interpreted in the same way.

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*In particular, the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions.*

<sup>44</sup> Vogel-Polsky, Eliane and Vogel, Jean: *L'Europe social 1993: Illusion, alibi ou réalité?* (1991) p.140.

<sup>45</sup> Jacobs, Antione T.J.M. and Zeijen, Hans: *European Labour Law and Social Policy* (1993) p.4.

<sup>46</sup> Mathijssen, P.S.R.F.: *A Guide to European Union Law* (1995) p.333.

<sup>47</sup> De Ruyt, Jean: *L'Acte Unique Européen* (1987) p.195.

As far as Mathijsen concerned, it can be agreed that regional policy is an important element in the realisation of economic and social cohesion, but it would be exaggerated to state that cohesion concerns mainly regional policy. Apart from the ERDF there are other instruments to implement the provisions of cohesion: the EAGGF Guidance Section, the European Social Fund, the European Investment Bank and other financial instruments (art.130/b). The priority objectives according to which the support is distributed contain not only regional objectives, but horizontal ones as well, that is to say, structural interventions targeted at the labour market can take place not only in regions lagging behind in their development, but anywhere in the Community. One can agree that the Regional Fund has a role of *primus inter pares* among the other Funds and financial means, since specific reference was made to its role among the cohesion provisions of the SEA (art.130/c). At the same time one should not forget that the ERDF was founded in 1975, thus it lacked a constitutional basis. By means of the Single European Act this shortfall was remedied.<sup>48</sup>

Turning back to the interpretation of economic and social cohesion, Streeck, along the same lines as Molle and Watson, argues that the opening up of the single market, with the elimination of barriers hampering the free movement of capital, leads to a tendency for entrepreneurs to make investments in regions which are the most appropriate for their aims. In the context of the labour market, this means not simply the search for the cheapest labour force but other factors such as industrial relations, the degree of flexibility, relations with public organs are also taken into consideration.<sup>49</sup> Consequently the various national systems are in competition, and the process might lead to deregulation in order to not discourage investment because of regulatory rigidity. This could not happen if there were a shift of regulatory competence in social matters from the national to supranational level. In this case there would be common (labour) standards which would stop downwards competition. But it is illusory to think that the power over social

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<sup>48</sup> As discussed in the section on the foundation and the early development of the ERDF, art.130/c contains the same definition as art.3 of the Regulation 1787/84 defining the task of the Fund.

<sup>49</sup> Streeck describes this system as *regime shopping*, a definition which is much wider than the one of "social dumping" which concentrates more on the tendency of devaluation of labour standards. (Streeck, Wolfgang: *La dimensione sociale del mercato unico europeo: verso un'economia non regolata?* (1990) 28 Stato e Mercato pp.30-32.)

policy which Member States have lost due to economic interdependence could be recovered at Community level. It is illusory not only because of the lack of political will in this regard, but also because of the lack of institutional support.<sup>50</sup> What the Community tried to do instead was to promote economic and social cohesion. Instead of regulatory, legislative intervention, namely the codification of clear standards, the Community opted for economic intervention, promoting equal conditions through structural programs.<sup>51</sup>

However, it is similarly illusory to think that intervention through the Structural Funds was able to inject enough capital to enhance growth or to solve chronic unemployment. The Structural Funds alone were not designed to bring about cohesion, but to supplement the workings of the free market and the general economic policies of the Member States. The overall size of the Structural Funds, even as they reached their 1999 target, has been insufficient to make any significant impact on either regional or national disparities within the Union.<sup>52</sup> The main engine of cohesion lies elsewhere.

The roots go back to the Commission's view of the social dimension of the internal market, more precisely to two contrasting approaches applicable to a Community social policy.<sup>53</sup> The first approach was the *normative* one, designed to achieve a single harmonising framework on all matters at Community level. This approach was applied

<sup>50</sup> D'Antona, Massimo: *Mercato unico ed aree deboli: le conseguenze giuridiche* (1992) *Lavoro e Diritto* p.56. It should be noted that the relationship between Community and Member State competence is too complex to be described as a simple transfer of competence. As Leibfried and Pierson argue, the process of European integration has eroded both the *sovereignty* (by which we mean legal authority) and the *autonomy* (by which we mean *de facto* regulatory capacity) of Member States in the realm of social policy. Member States have lost more control of national welfare policies, in the face of pressures of integrated markets, than the EU has gained in transferred authority. (Leibfried, Stephan and Pierson, Paul: *Social Policy* (1999) in Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* pp.185-186.)

<sup>51</sup> At this point it is clear that the situation is more complicated than suggested by Davies, who argued that the Commission opted for the policy solution in the shadow of the basically hopeless unanimity vote in the Council. A more fundamental argument besides those discussed above, might be the lack of proper 'social' reference in the Treaty. (Davies, Paul: *The Emergence of European Labour Law* (1992) in: McCarthy, W. (ed): *Legal Interventions in Industrial Relations. Gains and Losses* p.335.)

<sup>52</sup> Allen, David: *Cohesion and Structural Adjustment* (1999) in: Wallace, H. and Wallace, W. (eds): *Policy-Making in the EU* p.215. 7 thousand millions ECU were devoted to the activities of the Structural Funds in 1988. This amount was doubled on 1988 prices for 1993. (*Social Europe*, 3/1990. p.14.) See furthermore: Baylos Grau, Antonio: *Coesione Economica e Sociale; Fondi Strutturali* (1996) in: Baylos Grau, A.; Caruso, B.; D'Antona, M.; Sciarra, S. (eds): *Dizionario di Diritto del Lavoro Comunitario* p.272. See also: Rhodes, Martin: *The Future of the "Social Dimension": Labour Market Regulation in Post-1992 Europe* (1992) 30 *Journal of Common Market Studies* p.25.

<sup>53</sup> *Social Europe*, Special Edition (1988) pp.62-64.



only in a couple of fields: equal opportunities (art.119) and workplace health and safety (art.118/a). The other choice was the *decentralised* approach, which wished to see competition between social regimes and advocated minimal social legislation.

Considering the merits of the two approaches, the Commission opted for a middle route, looking to reconcile the, at times, contradictory priorities by means of policy-making according to the two underlying values: employment protection and employment creation. The climate was also more favourable for the decentralised approach than for the normative one.<sup>54</sup> The Thatcherite administration in the UK was very keen to block any Commission initiative with the aim of legislating for labour protection, instead it supported flexible employment patterns and working conditions, and the promotion of small and medium sized enterprises. At the same time as Delors launched the *Espace social* initiative, the British government proposed an Employment Action Programme, containing a set of flexible measures. Although the Commission was aware that the Community had to deal with growing unemployment, the need to adapt to new technologies and to the competitive labour market models from the US and Japan; when it referred to 'flexibility', it did not mean deregulation, but on the contrary, it intended to safeguard the social values of justice and security. According to Delors' vision of the European Social Area, and as reflected in the newly incorporated art.118/b, the implementation would be placed in the hands of the social partners, such that common basic standards would be established at Community level, and beyond these standards Member States would be free to negotiate.<sup>55</sup> This approach was unacceptable to the British government.<sup>56</sup>

As a result, the Commission and the British government appeared to be locked in a war of attrition in which neither had enough authority or support to triumph, but each had sufficient capacity to check the proposals of the other. It seemed like a classic stalemate

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<sup>54</sup> Rhodes, Martin: *The social dimension of the Single European Market: National versus transnational regulation* (1991) 19 European Journal of Political Research pp.245-53.

<sup>55</sup> Mosley notes that minimum standards established for employees seemed to be above all a political necessity to sustain broad support for the EC and its 1992 programme. (Mosley, Hugh G.: *The social dimension of the European integration* (1990) 129 International Labour Review p.162.)

<sup>56</sup> Hepple, Bob: *The Crisis in EEC Labour Law* (1987) 16 Industrial Law Journal p.81.

situation.<sup>57</sup> It was tempting to look for alternative possibilities to guide social issues. Kenner argues that the amendments to the EEC Treaty in the SEA are best understood as a compromise designed, in part, to break the deadlock by adopting a policy approach amounting to a sizeable concession towards the Thatcherite agenda of 'flexible labour markets', as evinced by the deregulatory nature of the Internal Market Programme, in return for the introduction of qualified majority voting, coupled with the co-operation procedure involving the European Parliament, in certain fields, most notably under the health and safety provisions of art.118/a.<sup>58</sup>

The institution which could benefit the most from the institutionalisation and codification of the economic and social cohesion was the Commission. The opportunity to expand its role flowed from the creation of those principles and priority objectives which have underpinned the functioning of the Structural Funds and the redistribution of the financial resources. On the basis of *concentration*,<sup>59</sup> *partnership*,<sup>60</sup> *additionality*<sup>61</sup> and *programming*<sup>62</sup> the Commission has obtained an autonomous role in many directions. It could contact regional and local authorities and organisations for the implementation of Community programmes through the Community Support Frameworks.<sup>63</sup> By recourse to the dissemination of best practices and innovative measures, the Commission could select, by its own discretion, those projects which most corresponded to Community interests. The projects under the label of 'Community Initiatives' were developed according to the guidelines established by the Commission, and the Member States had to propose

<sup>57</sup> Teague, Paul: *The EC: The Social Dimension; Labour Market Policies for 1992* (1989) p. 75.)

<sup>58</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy; Essays in Memory of Malcolm Mead* p.29.

<sup>59</sup> Community measures are based on the five priority objectives.

<sup>60</sup> The closest possible co-operation is sought between the Commission and the "appropriate authorities" at national, regional and local level in each Member State at every stage of the policy process from preparation to implementation.

<sup>61</sup> Each project is co-financed by the EC and through national funding.

<sup>62</sup> Multi-annual, multi-task, occasionally multi-regional projects are preferred to unco-ordinated individual national projects.

<sup>63</sup> It is very interesting to see how central governments used the principle of subsidiarity to reduce the autonomy of their own regional and local bodies. After the entry into force of the Maastricht Treaty, Member States claimed back the freedom to co-ordinate the cohesion measures with the Commission and insisted on having exclusive competence to enter into negotiations with the Commission. (Allen, David: *Cohesion and Structural Adjustment* (1999) in: Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.223.)

programmes in line with the Commission's guidance. Yet we have to examine by what means the Commission was able to obtain such an autonomous role.

To answer this question the notion of soft law has to be introduced. For today White Papers, Community Support Frameworks, Guidelines, Codes, generally known as soft law, have become widely accepted as instruments to assist the functioning of the Community. Their application was not entirely new at the time of the SEA; there were various codes of guidance elaborated much earlier by the Commission, but since the White Paper on the Completion of the Internal Market, there has been an ever-growing recourse to these instruments. Most of the story has been related elsewhere, and since the very notion of soft law is deeply rooted in legal theory, constitutional and administrative law,<sup>64</sup> the following is limited to a short definition and to an illustration of the role of soft law in the field under scrutiny.

According to Snyder, soft law means rules of conduct, which in principle have no legally binding force, but which nevertheless might have practical effects.<sup>65</sup> Wellens and Borchardt give a more circumscribed definition: Community soft law concerns the rules of conduct which are legally non-binding (in the sense of being enforceable and sanctionable) but which according to their drafters have to be granted legal scope. This legal scope has to be specified at every turn, and therefore these rules are not consistent with regard to their legal scope, but do have in common that they have the aim (due to the intention of the drafters) and the effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and

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<sup>64</sup> For general discussion of soft law, see: Snyder, Francis: *The Effectiveness of European Community law: Institutions, Processes, Tools and Techniques* (1993) 56 *Modern Law Review* pp.19-54; Snyder, Francis: *Soft Law and Institutional Practice in the European Community* (1993) EUI Working Paper, No.5; Wellens, K.C. and Borchardt, G.M.: *Soft Law in European Community Law* (1989) 14 *European Community Law Review* pp.267-321; Thürer: *The Role of Soft Law in the Process of European Integration*; (1990) in: Jacot-Guillarmod (ed): *L'avenir du libre échange en Europe: vers un Espace Economique Européen?* pp.131-138; Dehousse, Renaud and Weiler, Joseph H.H.: *EPC and the Single European Act: From Soft Law to Hard Law?* (1991) in: Holland, M. (ed): *The Future of European Political Cooperation* pp.142-163; Snyder, Francis: *European Community Law and International Economic Relations: The Saga of Thai Manioc* (1993) in: Macdonald, R. (ed): *Essays in Honour of Professor Wand Tieya: A Festschrift*

<sup>65</sup> Snyder, Francis: *Soft Law and Institutional Practice in the European Community* (1993) p.2; Snyder, Francis: *The Effectiveness of European Community law: Institutions, Processes, Tools and Techniques* (1993) p.32.

individuals, without, however, containing Community rights and obligations. In this light, having recourse to Community soft law appears to be justified if, and in so far that, it furthers the process of European integration.<sup>66</sup>

Some elements of this second definition require further clarification. Kenner points out that some Member States only pay lip-service to soft law measures since the Commission has no power to bring infringement proceedings. These measures can be of some use when they are allied to existing binding provisions subject to interpretation by national courts.<sup>67</sup> But alongside this weakness, soft law has numerous features which can be considered as progressive. Snyder argues that soft law might serve as a substitute for legislation and its function is to structure the Commission's discretion.<sup>68</sup> Soft law might be viewed as a useful form of regulation, a means of co-ordinating relations between Member States and of balancing unity and diversity. It could represent a suitable compromise to settle disputes, whether between the Community and the Member States, between the Member States themselves, or sometimes between different parts of the Commission.<sup>69</sup> This feature is further specified by Kenner, who argues that soft law can supplement the inadequacies of existing hard law without resorting to formal amendments. Going further, Community soft law, in all its infinite variety, should be understood as being wholly transitional, legitimising and encouraging conduct at national level to conform to a Community norm which, if it is not effectively carried out through

<sup>66</sup> Wellens, K.C. and Borchardt, G.M.: *Soft Law in European Community Law* (1989) 14 *European Community Law Review* pp.285 and 321.

<sup>67</sup> Kenner, Jeff: *Citizenship and Fundamental Rights: Reshaping the European Social Model* (1995) in: Kenner, J. (ed): *Trends in European Social Policy. Essays in Memory of Malcolm Mead* pp.43 and 45.

<sup>68</sup> The legal basis of the Commission's activity of issuing soft law measures is to be found in art.211 (ex art.155):

*In order to ensure the proper functioning and development of the common market, the Commission shall:*  
*-ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;*

*-formulate recommendations or deliver opinions on matters, dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;*

*-have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;*

*-exercise the power conferred on it by the Council for the implementation of the rules laid down by the latter.*

<sup>69</sup> Snyder, Francis: *Soft Law and Institutional Practice in the European Community* (1993) pp.26-27.

legislative action or judicial interpretation at a national level, must be achieved through binding Community law at a later date.<sup>70</sup>

Nevertheless, the transitory period until binding Community legislation is enacted might be a long one, or such period may also consolidate. In this case guidelines for action can be suggested by soft law measures, which promote policy initiatives and enforce the position of the Commission. And this is the situation in which the Community social dimension is to be found after the Single European Act. Sciarra writes, neatly encapsulating the most important features, that from the perspective of labour law, recourse to non-binding sources may have a dramatic impact on the consolidation of legal principles and policies: soft law may precede the formal law-making process, or highlight its inappropriateness. Soft law should be given high priority in the social field as a way of forcing governments as well as social partners to think in terms of policies, which may then be consolidated into customary rules.<sup>71</sup> And this is the prospect which characterises the subsequent development of the social dimension.

#### The Parliament's view on economic and social cohesion

To illustrate the contrast between expectations as to how economic and social cohesion could have been realised, and the outcome of the implementation through political and institutional compromises, a document of another Community institution should be recalled. The Parliament issued a Resolution at the beginning of 1989 on economic and social cohesion.<sup>72</sup> Some of its statements are fundamental for an accurate and nuanced understanding of cohesion, whereas some of the statements made can be seen as an early evaluation of the implementation of the Single European Act. The Parliament defines cohesion as a priority objective, on which depends the successful realisation of economic and monetary integration and of the internal market. One cannot deny that economic growth is possible even without cohesion, but this growth would be

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<sup>70</sup> Kenner, Jeff: *EC Labour Law: The Softly Softly Approach* (1995) IJCLLR pp.313. and 326.

<sup>71</sup> Sciarra, Silvana: *Social Values and the Multiple Sources of European Social Law* (1995) *European Law Journal* p.61.

<sup>72</sup> Resolution of the European Parliament on the economic and social cohesion, OJ C 47/54; 27.02.1989.

minor, unequal, favouring the already more developed regions and would lead to a Europe of two speeds, to economic disintegration.

In the Parliament's view, cohesion has two inseparable sides: the creation of an economic and of a social area; the former aims to end the disparity in regional development, the second has as its object the elimination of the causes of discrimination and social tension, a result which can be achieved by the approximation of the standards of living and salaries both between regions and individuals. The Resolution of the Parliament proposes applying those structural measures which had already proved to be successful in the field of economic integration. Regarding the social area, the Resolution recommends an adequate social protection net and social legislation, as well as intervention through the Structural Funds. It requires that intervention designed to achieve growth and cohesion should not be provided as simple aid but as assistance which is geared toward development, of which the Community as a whole can benefit.

The Resolution expresses the unhappiness of the Parliament that during the implementation of the SEA, the Commission was not particularly keen to recognise the interdependence between the internal market and the realisation of economic and social cohesion, since the opening up of the single market would not by itself bring about balanced economic integration. The Resolution adds that there was uncertainty over the implementation of those measures constituting the cohesion policy, and expressed its concerns that these cohesion measures would be treated as secondary to the realisation of the internal market. Furthermore, the Resolution suggests that neglect of the co-operative strategy of growth and of the social dialogue might not only be a serious obstacle to the success of the 1992 plan, but might also lead to troublesome political tension among the Member States. These comments of the Parliament make somewhat doubtful the fulfilment of Delors' declaration at the signing of the SEA that economic and social progress would go hand in hand.

The co-operative strategy of growth and cohesion as proposed by the Parliament is composed of general and particular elements. Under the general ones the most important

facets of the strategy include the comprehensive operation of the Structural Funds, with the caveat that their budget is still far short of requirements. The particular elements include the priority areas, suggesting a high interdependence between economic cohesion, social cohesion and the good management of human resources. The Resolution draws attention to the fact that the creation of the social area has been delayed, and urges its realisation particularly in the following fields: the struggle against youth unemployment; the search for a Community legal framework to enforce a high level of social security; the approximation of individual earnings through economic development; the improvement of health and safety through the gradual attainment of the level of those Member States who provide the highest protection; improvement of living conditions; protection against unemployment particularly that of long-term unemployment; accomplishment of free movement of persons; and special attention should be devoted to those groups in society which are exposed to marginalization. The Resolution argues that because of the gradual reduction in Member States' competence to intervene in social matters or to prevent social dumping or other social devaluation, it becomes vitally important to confer meaningful power on the social dialogue process, and to safeguard social rights to the same extent that they are protected in the most prosperous Member States, with a gradual approximation to this level in the less advanced Member States.

The detailed presentation of the Parliament's document provides room for a few comments. The Parliament, generally speaking, represents an optimistic, pro-integration view with special regard to the human and social consequences of the integration. It wishes to put in practice the principle that the primary goal of European integration is the well-being of its citizens, and not the opposite, that these citizens have to make unreasonable sacrifices in the name of integration. This commitment explains why the Parliament places more emphasis on the realisation of the social area than on the completion of the internal market, and it stresses on those aspects of cohesion which are sidelined by the Commission. When debating aspects of social cohesion, the Parliament goes far beyond the content of the relevant provisions of the Treaty. The search for a Community legal framework to ensure a high level of social security, and the attempt to harmonise the level of protection in the fields of health and safety and of social rights at

the level provided in the most advanced Member States, confirms that for the Parliament, social and the economic cohesion really have to go hand in hand. These factors explain that, apart from the labour market policies embedded in the operation of the Structural Funds, a need does exist to provide a firm legal basis which can enable European social standards to resist the pressure to reduce existing standards in order to preserve European competitiveness.<sup>73</sup>

#### Market and cohesion: Free and fair competition

Our purpose in this part is to highlight the importance of the cohesion measures from another viewpoint. The reasoning behind such intervention is not entirely new, and it fits into the Treaty's economic spirit in a very organic way.

The point of departure to explain the conflict between structural intervention and the value of free competition is that structural intervention in the less favoured regions fundamentally contradict the orthodox free market principles underlying the operation of the Community. The structural assistance given to regions which are weaker in their development is intended to promote productive potential, labour skills, and to create such an economic environment which ensures self-sustaining growth. At the same time, entrepreneurs within leading regions are denied such an assistance, since they are located in an environment which does not need additional stimulation.<sup>74</sup> In this respect, those who invest in the central regions are at a disadvantage compared to those who are privileged by the structural assistance; consequently the principle of free competition is undermined. The Directorate General of the Commission responsible for competition (DG IV) is very keen to oversee intervention which might prevent, restrict or distort free competition.

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<sup>73</sup> For similar opinion see: Vogel-Polsky, Eliane: *L'Acte Unique ouvre-t-il l'espace social européen?* (1989) Droit Social pp.177-189.

<sup>74</sup> The competitive advantages of the leading regions arise mainly from the following: transport and communications infrastructures, management, education and training capacity, research facilities, demographic situation. Nowadays natural mineral resources no longer have such an importance as they used to when heavy industry was the dominant factor in an economy. The factors which today underly the economic potential are to a certain extent exportable, transferable from one region to another, and such mobility can be promoted by the structural intervention.



To implement the principal idea behind the creation of the internal market, namely that the Community as a whole will benefit from the economic development, intervention is needed to create the conditions for economic growth in regions with scarce resources. This is done through the investment of public funds in order to attract private capital and to promote lasting development. National governments mostly have their own instruments to compensate the losers and to promote investment in regions lagging behind in their development. But only the Commission is in a position to identify the need for intervention, and to tailor such intervention to Community and not to national interests.

In order to reconcile market values and structural intervention, the concept of *fair* competition was created. This idea is at odds with the *free* competition ideology of DG IV, which seeks to promote integration through the removal of artificial barriers rather than through the promotion of less competitive regions.<sup>75</sup> The principle of fair competition can be witnessed in the Treaty provisions. Among the provisions on state aids, the legislator distinguishes between two groups of state aids. The first group comprises those aids which are allowed and considered to be compatible with the common market,<sup>76</sup> whereas the second group encompasses those circumstances where intervention in the form of state aids may be considered compatible with the common market. These circumstances are as follows: the promotion of economic development in areas where the standard of living is abnormally low or where there is serious underemployment; the execution of an important project within the common European interest; to remedy a serious disturbance in the economy of a Member State; to facilitate the development of certain economic activities or of certain economic areas.<sup>77</sup> These provisions were originally included in the Treaty, and the Single European Act did not change the wording of these articles or add new provisions.

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<sup>75</sup> Frazer, Tim: *The New Structural Funds, State Aids and Interventions on the Single Market* (1995) 20 European Law Review p.8.

<sup>76</sup> art.92(2) of the Treaty. *The following [aids] shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such an aid is granted without discrimination related to the origin of the product concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such an aid is required in order to compensate for the economic disadvantages caused by that division.*

<sup>77</sup> art.92(3) of the Rome Treaty.

The founding fathers devoted only a passing thought to the sort of measures which would be necessary to prevent a serious disturbance in the common market; it was therefore the SEA which fully fleshed out these provisions. It is not too difficult to see that the sort of aid which might be allowed as being compatible with the common market largely corresponds to the priority objectives which underpin the interventions of the Structural Funds. The Preamble to Reg.2052/88 similarly draws the attention to the fact that the operation of the Funds must be consistent with other Community policies, *inter alia* as regards competition policy. Competition rules are fully respected by the fact that structural intervention is permitted only in those situations which are recognised by the Treaty.<sup>78</sup>

Frazer, who originated the idea of distinguishing between free and fair competition argues for economic cohesion. Although it is true that state aids will always cause a distortion of competition, there can be a 'compensatory justification' for such interventions. Such a justification will outweigh the adverse effect on competition where it serves some Community objective (such as economic cohesion) and where the market itself would not be capable of serving such an interest in the short or medium term. Thus there is a certain complementarity between the Structural Funds' interventions and competition (state aids) policy, and if they are properly co-ordinated, they should not cancel each other out.<sup>79</sup> However, regional aid must be controlled for the sake of its own effectiveness and for the sake of economic and social cohesion in the Community.<sup>80</sup>

<sup>78</sup> It might be of interest to note that the representatives of DG IV probably do not share this opinion. In fact there is a continuous struggle between the two DGs over the enforcement of these principles. DG IV advocates the principle of free competition, whereas DG V argues for that state aid schemes should be seen as compatible within the common market.

<sup>79</sup> The approach of DG IV was to focus on welfare creation. It accepted aid schemes if they increased welfare in a poorer region to a greater extent than they reduced welfare in a core region. (Frazer, Tim: *The New Structural Funds, State Aids and Interventions on the Single Market* (1995) 20 *European Law Review* pp.10-12.) It has to be added that the main argument of DG IV against state aids is that more often than not they lead to the export of unemployment, by helping the survival of undertakings unable to adapt to market conditions. Furthermore they argue that the availability of state aids is not a decisive factor when management decides on a firm's location. The most important element is the accessibility of the market. If there is no chance to sell the products of the company because supply exceeds demand or if there is no purchasing power the firm will search for another location. The second element on the list is the business environment, including infrastructure, networks, suppliers, distributors. Then follows the qualifications and the cost of labour. Only at

The legal basis provided by the provisions on state aids in fact can be seen as the substantive foundation of the cohesion rules given that the newly incorporated articles on economic and social cohesion are mainly a source of procedural rules.

As in previous chapters, we examined the commitments and promises taken at a turning point in the Community's history. With the Single European Act the social dimension continued its development along the path set out by former events and initiatives. Within the framework of the common, then internal, market, labour law gained a new competence: the regulation of workplace health and safety. Structural interventions into the labour market became central, the aim was no longer to compensate those who were to be considered as losers from economic integration, but it was recognised that an effective social policy was a necessary support for economic policy. Thus, by means of redistribution, all regions and societal groups were to be placed in a position to be able to participate successfully in the internal market programme. This commitment was incorporated into the Treaty under the provisions on economic and social cohesion.

By introducing the goal of economic and social cohesion, the role of policy initiatives was further strengthened. This left a considerable margin for the Commission's discretion and enhanced multi-actor participation. The provisions on economic and social cohesion limited the dominance of free competition, structural interventions became compatible with the Community's market philosophy, thus creating the conditions for fair competition.

Renewed emphasis was placed on the interaction between the social partners both at the European and at the lower level, although in this regard, the SEA was relatively silent. The intention was for harmonisation of social legislation to occur mainly through

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the very end of this list can the availability of subsidies be found. (information based on interviews with DG IV and DG V officials)

<sup>80</sup> Wishlade, Fiona G.: *Competition Policy, Cohesion and the Co-ordination of Regional Aids in the European Community* (1993) 14 *European Competition Law Review* p.149.

the national industrial relations system with minimum standards established at Community level; however, the conditions were not yet sufficiently advanced for a Community-wide vertical and horizontal interest-articulation.

## **Chapter IV**

### **ATTEMPTS TO CHANGE THE COURSE: THE COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS AND THE MAASTRICHT TREATY**

Continuing our historical survey, two documents will be analysed: the Community Charter of the Fundamental Social Rights of Workers adopted in 1989 and the Maastricht Treaty, with special attention devoted to the Social Chapter annexed to the Treaty. Both the Community Charter and the Social Chapter were designed to confer a distinct shape on the social dimension, but both initiatives proved to be premature. It is true that today, the discussions surrounding the birth of these documents have mainly historical importance, yet giving a detailed account of these developments helps us understand the period of European social policies analysed here. And both documents still have meaningful roles, albeit under substantially different conditions.

The Community Charter of the Fundamental Social Rights of Workers reflected the need to protect social rights independently from the interests of economic integration. It was imperative to confer a social identity on the Community. Although the Charter enumerated the social and economic rights to be guaranteed at Community level, it remained a solemn declaration, thus legally non-binding. It was implemented through an Action programme, which then led to binding legal measures and Community initiatives. However, the legal basis provided by the Treaty was still limited to social measures, thus the norms enacted had to be based on economic reasoning.

The Maastricht Treaty tried to remedy the situation. It introduced the concept of Union citizenship to reverse the alienation and disaffection of individuals from the process of European integration. It also aimed to modify the social provisions of the

Treaty by introducing important innovations regarding both substantive and procedural norms. The Social Chapter dispels the notion that Community action is needed only to remedy distortions of competition. It sets out the objectives of a Community social policy, overcoming the vague wording of art.117 and the programmatic nature of art.118 of the Rome Treaty. It institutionalised not only the role of the social partners, but also enriched the sources of Community law: in accordance with the fundamental precepts of labour law, the Social Chapter recognises a consensual means of decision-making, in addition to the authoritative ones. However, the contracting parties felt themselves unable to reach consensus and the revised Social Policy title was omitted from the Treaty. It became binding only in relation to 11 of the Member States, causing numerous ambiguities. Consequently, only limited recourse was had to the new tools available.

## I.

### **The Community Charter of the Fundamental Social Rights of Workers**

#### The need for a Community framework to guarantee social standards

After the launch of the Internal Market programme and the amendment of the Treaty by the Single European Act, the initial enthusiasm for the European Social Area evaporated, leaving greater room for doubts to emerge. The Resolution of the Parliament has already been mentioned,<sup>1</sup> which invited the Commission to explain why it had not yet put forward a set of systematic initiatives to bring about social cohesion. Those who advocated the promotion of social progress at European level went further, and placed the problem in a wider framework than the policy of economic and social cohesion recently incorporated into the Treaty. There was a growing tendency to draw attention to the lack of a single set of social rights.

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<sup>1</sup> Resolution of the Parliament on the economic and social cohesion, OJ C 47/64; 27.02.1989. For details see Chapter III.

There were a number of good reasons underpinning this development. What influenced the problem in one, rather trivial, way was the opening up of the internal market and the elimination of the physical, fiscal and technical barriers between the Member States, in order to facilitate the movement of capital. Investments are influenced by various factors, but the cost of labour and other factors attached to labour, such as labour standards or industrial relations, play an important role.<sup>2</sup> Lower standards, a less protected work force, and ultimately cheaper labour, attract investments from Member States with higher standards towards the ones promising lower costs and higher profit. The phenomenon described here is well-known: social dumping.<sup>3</sup> The argument was raised when remedies were proposed in the form of structural intervention, but there is another means to prevent social dumping. In order to provide for a balanced geographical development of the Community's economy and to prevent a decline in existing social standards, it was felt that there should be some harmonisation of social standards.<sup>4</sup> Yet the other extreme situation which can present itself should not be forgotten: the struggle to avoid social dumping by establishing a system with a high level of mandatory benefits can end up with an undesirable outcome: A mass of mandated benefits would raise labour costs in such a way as to disproportionally affect the less productive workers and areas. This outcome would be contrary to the Commission's intention to achieve the highest level of protection ensured under national laws and practices.<sup>5</sup>

Nevertheless, the voices promoting social rights became stronger and stronger. The absence of an overarching legal framework to guarantee social standards against market interventions became pressing, and in 1987, during the Belgian Presidency a draft Social

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<sup>2</sup> Blanpain, Roger: *1992 and Beyond: The Impact of the European Community on the Labour Law Systems of the Member Countries* (1990) Comparative Labor Law Journal pp.404-405.

<sup>3</sup> On the notion and categories of the social dumping see: Teague, Paul: *The EC: The Social Dimension; Labour Market Policies for 1992* (1989) pp.77-80; Jacobs, Antoine, T.J.M. and Zeijen, Hans: *European Labour Law and Social Policy* (1993) pp.124-127.

<sup>4</sup> Watson, Philippa: *The Community Social Charter* (1991) 28 CMLReview p.43; D'Antona, Massimo: *Mercato unico europeo ed aree deboli: le conseguenze giuridiche* (1992) 6 Lavoro e Diritto p.59.

<sup>5</sup> Addison, John T. and Siebert, W. Stanley: *The Social Charter of the European Community: Evolution and Controversies* (1991) Industrial and Labour Relations Review p.623. The phenomenon is equally called as social dumping in reverse (*dumping sociale alla rovescia*). (Treu, Tiziano: *Pubblico e privato nell'Europa sociale* (1990) 4 Lavoro e Diritto p.336.)

Charter to ensure the protection of social rights in the Community was prepared.<sup>6</sup> The proposal provoked intensive discussion, since both the social partners and the Member States had strong views on the content of the Charter.<sup>7</sup> After the initial enthusiasm the discussion became sharper, and beyond the substantive elements it included the issue of the legal status of the Charter. Apart from the British government, the UNICE also objected to a binding document. In May 1989 as the situation became more delicate in the search for a compromise, the Commission itself proposed adopting the Charter in the form of a solemn declaration, thus depriving it of binding force.<sup>8</sup> This decision constituted a substantial step backwards from the initial ambitions.<sup>9</sup>

The atmosphere in the negotiations can be illustrated by the final declaration of the Madrid Summit, in June 1989: "in the single European market social aspects should be given the same importance as economic aspects and should accordingly be developed in a balanced fashion." At first sight, the Declaration pronounced in Madrid does not say anything new compared to the Declaration made in Paris in 1972. However, this does not mean to say there has not been a shift in attitudes with regard to the social dimension of the Community. What has changed was not the belief in the fundamental objective of market building, but there was a confrontation with the unique and exclusive nature of this objective. It was recognised that structural measures and policy initiatives cannot successful substitutes for regulatory interventions to protect social values against market erosion.

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<sup>6</sup> The very first proposal on this issue was the Resolution of the Parliament, 4 April 1973. The initiatives to establish a basic protection for the workers of the EC by the recognition of fundamental social rights in the Community legal order can be dated back to this document. See: Vogel-Polsky, Eliane: *Quale futuro per una politica sociale europea?* (1991) 5 *Lavoro e Diritto* p.333.

<sup>7</sup> On the history of the adoption of the Social Charter see: Teague, Paul and Grahl, John: *The European Community Social Charter and Labour Market Regulation* (1991) 11 *Journal of Public Policy* pp.211-216.

<sup>8</sup> To secure the unanimous approval for the Charter, some of the more contentious proposals were also deleted. (Lodge, Juliet: *Social Europe* (1990) 13 *Journal of European Integration* p.143.)

<sup>9</sup> Bercusson, who was very enthusiastic about the Charter argues that the legal nature of the Charter is secondary to its political significance. (Bercusson, Brian: *Maastricht: a fundamental change in European labour law* (1992) 23 *Industrial Relations Journal* p.179.) Other authors, such as Hepple, Sciarra, Davies, Wedderburn are more skeptical.



Further, a clear recognition was reached that labour market regulation and employment policy cannot adequately guarantee the protection of rights. The need arose to create a Community-level means to shape the social identity of this same Community. Albeit one could be disappointed, seeing the Charter as an unsuccessful attempt to guarantee social rights, due to the fact that it remained a non-binding source, it still has its indisputable merits. For the first time in Community history social rights were enumerated which would require a Community-level guarantee. Then the Action Programme<sup>10</sup> based on the Charter promoted the elaboration of binding measures and Community initiatives with the purpose of implementation. Important lessons can be drawn from the manner in which the Charter developed.

### The promises of the Charter

Eliane Vogel-Polsky, in her article on the consequences of the Strasbourg Summit, argues that the Charter, if it had been a binding document, would have created a new legal basis with which to open the way towards the European social dimension. She points out the main features that the Charter would have possessed if it had become legally binding. The Charter would have been able to:

- Integrate, harmonise or unify the formulation of those principles and general rules universally recognised by all the Member States and by all the social partners;
- Ensure that those specific rights, whose recognition at European level is tied to the transformations brought about by the realisation of the internal market, are applied uniformly;
- Secure the recognition of new rights where necessary;
- Establish the legal basis for collective negotiation at European level;
- Set out unified ways of supervising and overseeing the implementation of Community social standards.<sup>11</sup>

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<sup>10</sup> Communication from the Commission concerning its action programme relating to the implementation of the Community Charter of Basic Social Rights for Workers; COM(89)568.

<sup>11</sup> Vogel-Polsky, Eliane: *What Future is There for a Social Europe Following the Strasbourg Summit?* (1990) 19 Industrial Law Journal p.65.

Vogel-Polsky keeps in mind that the Charter has remained a solemn declaration and states that it did not bring anything new to the scene of the social dimension, since all the initiatives incorporated into the Charter can be based on other sources.<sup>12</sup> She establishes three groups:

- Some of the competences in the field of social rights have already been transferred to Community institutions. Here she makes reference to the social provisions of Community law, an area which has long existed, although it is rather weak, such as equal treatment for men and women (art. 119), workplace health and safety (art. 118/a).
- The realisation of the internal market will inevitably affect the social dimension, as social consensus is needed to achieve stable economic growth, thus the accompanying social measures have crucial importance. Consequently when the Commission launches its single market programme, it already contains initiatives in the area of the social dimension.
- Some of the fundamental social rights incorporated into the Charter already appear in international human rights documents produced by the United Nations, the Council of Europe, or in the ILO Conventions. These documents have been ratified by all the Member States, therefore their binding force cannot be questioned although outside of the scope of Community law.

Building on Vogel-Polsky's classification, with a very critical approach we can start clarifying to what extent the Charter has contributed to the evolution of the social dimension. In the light of the above statements, we can raise the following questions and comments:

1. Is there a sufficient Community legal competence to guarantee the rights listed in the Charter?
2. Was the realisation of the internal market adequately accompanied by initiatives on the social dimension?

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<sup>12</sup> A contradiction between the statements cannot be ignored. On the one hand Vogel-Polsky argues that a binding Charter would have secured the recognition of new rights where necessary (point 3) and that it would have established the legal basis for collective negotiations on European level (point 4), on the other hand she states that it did not bring about anything which could not have been derived from other sources.

3. The implementation of social standards and the control of their uniform application are extremely delicate issues. Their supervision goes far beyond the elaboration of a Charter, their implementation and enforcement evoke constitutional concerns even in the most highly developed welfare states.
4. Was there a sufficient factual basis for European level collective bargaining which lacked only the legal recognition?
5. It is clear that the Member States have the obligation to protect social rights under international agreements. But the Charter aimed to establish a Community-net to protect these rights. Therefore the reference to national obligations under international public law is not appropriate.

The most important comment is the one speculating on the substantial correlation between the Charter and the Treaty. This question will be examined in detail. The second comment can be easily answered, as it seems logical that the imperative to create a Community catalogue of social rights could come on the agenda precisely because the completion of the internal market was not sufficiently accompanied by initiatives promoting social cohesion.

Analysis of this third issue goes far beyond the Charter, and it necessarily involves reflections from the fields of constitutional law and legal theory. A short note on the nature of the problem should be sufficient. Social and economic rights belong to the category of aspirational or instrumental rights which can be described by the common characteristic that "they cannot ... possess any real significance without an appropriate intervention by the public authorities."<sup>13</sup> The intervention of the State or local public authorities has to be continuous in order to provide satisfactory conditions. At this point the implementation of these rights largely depends on the availability of financial and material means and ultimately on the economic capacity of a given country. Yet not everybody shares this opinion and agrees with the categorisation of rights according to

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<sup>13</sup> Lenaerts, Koen: *Fundamental Rights to Be Included in a Community Catalogue* (1991) 16 European Law Review p.386.

whether they are dependent on public intervention or not.<sup>14</sup> In this respect there is a basic difference between the enforcement of civil and of aspirational rights. Shaw points out this distinction, in reference to the Community Charter: "... it is a moot point whether the Court of Justice would ever be willing to extend its fundamental rights case-law by reference to open-ended aspirational rights such as those included in either the Community or the European Charter. The content of such rights is insufficiently certain to permit of judicial enforcement by the Court of Justice."<sup>15</sup>

In view of the history of European level social dialogue, the fourth question seems relatively unimportant. It is undeniable that there is a dialogue between the social partners at European level, but its intensity is variable and its capacity to influence decision-making mechanism is limited. The fifth comment, at this point, does not ask for further elaboration.

Among the above comments, the most crucial issue, to be examined at length, concerns the legal basis: to what extent can the provisions of the Treaty guarantee the rights listed in the Charter? First a table should be presented putting together the headings enumerated in the Charter and Treaty articles, in order to examine whether the competence necessary to guarantee the rights of the Charter has been shifted to the Community.<sup>16</sup>

Freedom of movement	art.7, 48-51.
Employment and remuneration	and art.52-58.
Improvement of living and working conditions	generally art.117-122.
Social protection	art.51, 121.
Freedom of association and collective bargaining	art.118/b, relating to European level social dialogue

<sup>14</sup> Tushnet, Mark: *Civil Rights and Social Rights: The Future of the Reconstruction Amendments* (1992) Loyola of Los Angeles Law Review pp.1207-1209.

<sup>15</sup> Shaw, Jo: *Twin-Track Social Europe -the Inside Track* (1994) in: O'Keeffe, D. and Twomey, P. (eds): *Legal Issues of the Maastricht Treaty*, p.302.

<sup>16</sup> In this exercise we intend to be more precise than the 11th recital of the Preamble of the Charter which catalogues some references.

Vocational training	art.128 (SEA), <sup>17</sup> and generally art.130/a-e.
Equal treatment for men and women	art.119.
Information, consultation and participation of workers	-
Health protection and safety at the workplace	118/a.
Protection of children and adolescents	-
Elderly persons	-
Disabled persons	-

In most cases the connection with the Treaty is remote and imprecise or there is no proper correspondence with the primary legal source at all. The most outstanding examples are the reliance on the vaguely worded art.118/b in connection with the European level social dialogue, and it is of common knowledge that there is no primary Community source guaranteeing rights to information or consultation. Similarly, the protection of children, the elderly and disabled persons is not defined and guaranteed in the Treaties. Vogel-Polsky refers to the Preamble to the Charter, which lists arts.100, 100/a and 235 as ultimately remedying the lack of appropriate reference in the Treaty. She argues that in the context of Community law when the realisation of social objectives is in question because of the lack of specific social aims in the Treaty, legislation is compelled to have recourse to the more general articles. She emphasises the importance of art.8/b, introduced by the Single European Act, which provides a balanced progress in all the sectors concerned while the internal market is completed.<sup>18</sup> To bring this discussion to an end it can be said that the ultimate recourse to these general articles on the realisation of the internal market, is further evidence of the lack of an appropriate basis for the implementation of the Charter, rather than evidence of a substantial correspondence between the Treaty and the Charter.

<sup>17</sup> art.128 as incorporated by the Single European Act: *The Council shall, acting on a proposal from the Commission after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market.*

<sup>18</sup> She summarises that arts.8/a, 8/b and 100/a form the legal basis of the social dimension of the internal market. (Vogel-Polsky, Eliane: *What Future is There for a Social Europe Following the Strasbourg Summit?* (1990) 19 Industrial Law Journal pp.72-73.)

In fact the Charter and its relation to the Treaty reflect the collision of two approaches: the Treaty protects social objectives on the basis of and subordinated to market integration; consequently the protection is restricted to the world of labour market and employment, whereas the Charter aims to guarantee those social rights which can be tied to the context of work. Let's examine this collision more in depth: arts.51 and 121 of the Treaty speak about the co-ordination of national social security schemes and set out guidelines to pursue this aim, whereas art.10 of the Charter requires that every worker of the European Community shall have a right to adequate social protection and to an adequate level of social security benefits. To give another example, the articles of the Treaty devoted to the freedom to choose and pursue activities<sup>19</sup> do not spell out the requirement that all employment shall be fairly remunerated. Art.5 of the Charter even goes into details such as stating that the wage has to be sufficient to enable workers to have a decent standard of living, or that an atypical employment contract should benefit from an equitable reference wage, or that wages cannot be withheld, seized or transferred beyond the level necessary to provide subsistence for a worker and his family. As a third example, art.15 of the Charter provides that every worker of the European Community must be able to have access to vocational training, whereas art.128 of the Treaty provides general principles for implementing a common vocational training policy capable of contributing to the harmonious economic development both of the national economies and of the common market.

In summary, the wording of the Charter is far more precise, it enumerates rights, whereas the Treaty speaks at most about policies, to the extent that it refers at all to such matters (with the exception of art.118/a and 119). It is necessary to underline that although some overlaps do exist, it does not mean that the Treaty possesses the sufficient extension of competence to guarantee the rights laid down in the Charter.

The problem is further complicated by the confusing commitment in the Charter's Preamble that the Charter must not entail an extension of the Community's power as

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<sup>19</sup> The right of establishment arts.52-58.

defined in the Treaties.<sup>20</sup> It follows from the analysis provided above that if the rights enumerated in the Charter were to be implemented and guaranteed they would necessarily have gone beyond the competences of the Treaty.

The emperor is naked, the Charter is not as originally envisaged. It contains a clear manifesto detailing what the Community needs: a catalogue of social rights which can be guaranteed and enforced under Community law. This requirement cannot be incorporated within the existing Community framework without a fundamental re-examination:<sup>21</sup> the Charter is a warning signal that social objectives have gained a value independent from the economic process.<sup>22</sup> There was an initial readiness of the negotiating partners to make compromises and this was reflected in the content of the Charter. However, this readiness was not sufficiently strong, lasting or single-minded to last and to create a binding document. The Charter remained a solemn declaration; consequently it can only inspire future Community action, which have to fit into the existing legal framework. This is why the Preamble attempts to establish a bridge between the fundamental rights approach of the Charter and the Treaty's employment protection approach.

Further examination has to be carried out on the Charter, as a solemn declaration. By nature, it is an 'instrument of policy on law',<sup>23</sup> and its binding force is particular, it can inspire action for implementation and can be an important aid to interpretation.<sup>24</sup> As a

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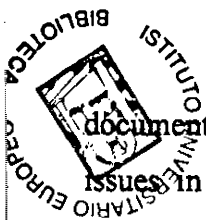
<sup>20</sup> The end of the 11th consideration of the Preamble of the 1989 Charter.

<sup>21</sup> Addison and Siebert remind that the main criticism of the Social Charter has been that some of its articles appear to lie outside of Community competence so that its acceptance would imply amendment, *via* back door, of the Treaty of Rome. (Addison, John T. and Siebert, W. Stanley: *The Social Charter of the European Community: Evolution and Controversies* (1991) Industrial and Labour Relations Review p.598.)

<sup>22</sup> Davies, Paul: *The Emergence of Labour Law; Gains and Losses* (1992) in: McCarthy, W. (ed): *Legal Interventions in Industrial Relations* p.342. Simitis and A. Lyon-Caen reach the same conclusion though attached more to the SEA. (Simitis, Spiros and Lyon-Caen, Antoine: *Community Labour Law: A Critical Introduction to its History* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives; Liber Amicorum Lord Wedderburn of Charlton* p.9.)

<sup>23</sup> The expression is used by Rodriguez-Pinero, Miguel and Casas, Emilia: *In Support of a European Social Constitution* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives; Liber Amicorum Lord Wedderburn of Charlton* pp.34. and 37. Watson argues similarly: "The Charter is unique in Community law. It does not correspond to any of the legislative or policy instruments normally used by Community institutions in the exercise of their powers to attain Community objectives." (Watson, Philippa: *The Community Social Charter* (1991) 28 CMLReview p.45.)

<sup>24</sup> At best, it could be placed among the general principles as sources of Community law. (E.g.: Gaja, Giorgio: *Introduzione al diritto comunitario* (1999) pp.101-103.



document containing political commitments, it tried to encompass most of the burning issues in the social field, and to provide some solutions: to bring together national systems, to avoid social dumping by setting minimum standards, and to define social rights at Community level. Undoubtedly, a political obligation can contribute to a large extent to effectiveness, but it is well-known that this kind of obligation can be fundamentally modified or eroded by the changing political-ideological climate.

In view of the incompatible approaches of the Charter and the Community legal order the title of the Charter was also modified to suit the fundamental spirit of the Treaty. According to the underlying principles and values of the founding fathers, people were considered only as the human factors of production, not as citizens. The title of the Charter referred to the rights of citizens, not to those of workers, in its first and second drafts, and only in the final draft did 'workers' appear.<sup>25</sup> Throughout the Charter, the category of workers is consequently used with only a few exceptions. These exceptions concern disabled people, elderly people, those who are excluded from the labour market and those who do not have sufficient means of subsistence.<sup>26</sup> The aim to improve their social integration is the sign of solidarity which is an inalienable principle within the European social model. Two other examples which go further than the strict notion of workers similarly illustrate the realm of universal human rights: the reconciliation of career and family life and the attention devoted to family reunification.<sup>27</sup> The limitation of the personal scope mainly to workers brings two consequences: on the one hand the ever-growing group of unemployed is completely excluded, notwithstanding their extremely weak position; on the other, the changing notion of work requires the critical re-

<sup>25</sup> Bercusson, Brian: *The EC's Charter of Fundamental Social Rights of Workers* (1990) 53 *Modern Law Review* p.626. and Bercusson, Brian: *La Carta Comunitaria dei Diritti Fondamentali Sociali: Obiettivi, Strumenti* (1991) 3 *Lavoro e Diritto* p.322. (Italian translation of the former article) In the articles quoted the author provides a detailed analysis of the changes the Charter went through during the negotiations of the various drafts. In fact the category of workers can be wider than the one of citizens: it includes those who work in the Community but are not citizens of Member States. Regarding the meaning of this category, there is a reference in the Preamble to the Charter: *Whereas it is for Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the EC are able to enjoy, as regards to their living and working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State concerned.* Apart from this brief allusion, however, there is no more detail in the Charter concerning third country workers.

<sup>26</sup> In these cases the applied category is: persons. See: arts.10; 25; and 26.

<sup>27</sup> See: arts.2 and 16.



examination of the approach which ties certain benefits and rights to the classical open-ended work contract. This changing notion of work and the enlarging variety of work contracts can easily justify why it would be preferable to tie certain consolidated social rights, such as social protection, to the category of citizenship.

### The reality: the Commission's Action Programme

In connection with the Action Programme drawn up to implement the Charter, a few comments are necessary on the procedural part of the Charter. Title II (art.27-30) provides that it is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee fundamental social rights. It means that the Charter applies the principle of subsidiarity on a legal basis, it puts the *responsibility* for the implementation in the hands of the Member States (art.27).<sup>28</sup> However, in a partly contradictory way, in art.28 the Charter recalls the functional approach of the subsidiarity principle, and it invites the Commission to submit proposals for the *effective* implementation. This mixture of approaches might lead then to incoherent implementation, but a cornerstone of the position can be clearly recognised: achieving a close synchronisation of labour market policies will not be straightforward because many national policies are the result of peculiar social and political contexts as well as specific institutional conditions in each Member State. Consequently the strategy of harmonisation is explicitly rejected, instead convergence and co-operation is pursued.<sup>29</sup> In this context, the two approaches of the subsidiarity principle could theoretically be accepted: the efficiency factor has to be understood as the creation and co-ordination of policy networks and benchmarking. Yet

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<sup>28</sup> According to Treu, Community intervention must be restricted to the specific competences spelled out in the Treaty, the rest being in Member States' competence; further, that intervention must be sufficiently flexible, taking into account national diversity, and therefore being binding only in its results. (Treu, Tiziano: *L'Europa Sociale: dall'Atto Unico a Maastricht* (1991) Quaderni di Diritto del Lavoro e delle Relazioni Industriali No.10. p.14.)

<sup>29</sup> Teague, Paul and Grahl, John: *The European Community Social Charter and Labour Market Regulation* (1991) 11 Journal of European Social Policy pp.218-219. Wedderburn goes one step further: "Indeed, one objective must be to ensure that Community legislation underpins, and cannot obstruct, the domestic legislation of labour." (Lord Wedderburn: *The Social Charter, European Company and Employment Rights* (1990) p.56.)

the reconciliation of the two approaches is purely theoretical: in practice it is rather complicated to abstain from enacting substantive measures when benchmarking policies are in question.<sup>30</sup>

The Action Programme does not clarify the situation with regard to the application of the subsidiarity principle. Similarly, the Action Programme suggests that, in the Commission's view, responsibility for the initiatives to be taken to enforce social rights lies with the Member States, their constituent parts or the two sides of industry, as well as the European Community -within the limits of its powers. At the same time, the functional approach is also referred to: the principle of subsidiarity is generally applicable where the intervention of the Commission is justified by the attainment of a more efficient outcome (point 3). As Teague and Grahl rightly argue, the boundary of subsidiarity appears to be fairly arbitrary. In the absence of precise definitions, it is plausible that the three levels will continue to co-exist in an unco-ordinated and incoherent way.<sup>31</sup> The extent to which the non-legally-binding Community Charter and the Commission's Action Programme based upon that Charter influence the framework of competences remains all but resolved.<sup>32</sup>

Concentrating now on the Action programme, it is necessary to point out that the Commission launched it at the end of September 1989, with the intention of implementing the Charter.<sup>33</sup> The Action Programme had been published before the Charter was signed by 11 Member States at the end of the year and in fact there is no legal link between the two documents. One could exist without the other and vice versa. Regarding the substance of the two documents, not all aspects of the Charter were underpinned by the Action

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<sup>30</sup> Hepple adds that at the end the principle of subsidiarity in the context of the Charter is of political rather than legal significance, because the validity of the measures will depend ultimately on whether they can be justified under the existing legal basis. (Hepple, Bob: *The Implementation of the Community Charter of Fundamental Social Rights* (1990) 53 *Modern Law Review* p.647.)

<sup>31</sup> Teague, Paul and Grahl, John: *The European Community Social Charter and Labour Market Regulation* (1991) 11 *Journal of Public Policy* p.217.

<sup>32</sup> Weiss, Manfred: *The Significance of Maastricht for European Community Social Policy* (1992) 8 *IJLLIR* p.4.

<sup>33</sup> COM(89)568 The AP is not binding and each of its proposals will have to go through the normal legislative process including the ultimate approval of the Council.

Programme nor did the whole Programme have its justification in the Charter.<sup>34</sup> However, more often than not the two documents are discussed together notwithstanding the numerous ambiguities. Although the Commission states in the Point 1 of the Action Programme that it intends to implement the rights contained in the Charter, this statement cannot be true. The limited social objectives of the Treaty are built, at best, on the employment protection approach and when the Commission took the initiative to prepare the Action Programme, the strategies were adopted as part of a Treaty-base game.<sup>35</sup>

A further fundamental problem with the Action Programme also concerned the legal basis: although the Commission indicates the nature of proposals to be presented - directives, regulations, decisions, recommendations, communications or opinions- within the meaning of art.118, it does not indicate the proper legal bases on which the proposals will be based. The AP points out that although the legal basis to which the Commission could refer are set out in one of the recitals of the Charter, it finds it premature to make statements with respect to the legal basis for proposals to be made in the course of the following three years (point 10). This attempted justification is simply inadmissible. The legal basis either does exist, or does not. In fact the Commission was well aware of the weakness of the legal basis, it simply did not want to disguise it unequivocally.<sup>36</sup> No one had foreseen the need to amend the Treaty again, so soon after the Single European Act, in order to codify social objectives more precisely. The only solution the Commission may have believed in or could hope for was a decisive political commitment which could give a push to implementation, as was the case after the Paris Summit of 1972.

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<sup>34</sup> Rodriguez-Pinero, Miguel and Casas, Emilia: *In Support of a European Social Constitution* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton p.37; Sciarra, Silvana: *Il dialogo fra ordinamento comunitario e nazionale del lavoro: la contrattazione collettiva* (1992) *Giornale di diritto del lavoro e di relazioni industriali* No.56. p.717.

<sup>35</sup> Deakin, Simon: *Integration through Law? The Law and Economics of European Social Policy* (1997) in: Addison, J.T. and Siebert, W.S.(eds): *Labour Markets in Europe: Issues of Harmonisation and Regulation* p.123.

<sup>36</sup> The Commission recognised this lacuna in its contribution to the IGC on Political Union: "there is a wide gap between the powers available under the current legal basis and the ambitious programme set out in the Charter and the new constraints arising out of the completion of the internal market." (SEC(91)500final; 30.03.1991. p. 84.)

The principal task the Action Programme was entrusted with was to provide a basis around which national legislation could converge and benchmark policies related to the rights listed in the Charter by setting out clear values and standards. In the following we have to examine whether this task can be fulfilled by re-viewing the proposals of the AP.<sup>37</sup> It advocates the elaboration or the revision of 3 regulations, 4 decisions, 17 directives (of which 10 concern the field of health and safety), 5 recommendations and of a great number of unspecified Community or Commission instruments. It gives preference to national laws and collective agreements over Community measures, and according to the Treaty's labour market regulation approach, limits Community proposals to those which contribute to economic and social cohesion (point 5). Therefore, in some cases, the Action Programme does not propose Community measures at all. That is the case as far as freedom of association and the right to collective bargaining are concerned, considering that these issues fall entirely within the competence of the Member States. Notwithstanding, the Commission actively seeks to promote Community level social dialogue (point 6 and art.12). Wedderburn considers as a crucial omission of the Charter and the Action Programme the fact that they require a range of individual employment rights at Community level, but collective rights remain on separate 'subsidiary', national agendas. Albeit the law provides protection, the protection which comes from the freedom to negotiate collectively is recognised as essential for workers since rights are more efficiently protected where there is a strong and autonomous union presence. Yet the Community level social dialogue cannot replace collective bargaining, the former is consensual, not conflictual as is the latter; the former is oriented toward macroeconomic issues whereas the latter to resolve conflict by 'joint administration' in the workplace.<sup>38</sup>

The Action Programme is divided into 12+1 chapters according to the headings of the Charter. There is one additional chapter on labour market initiatives. "This is the field

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<sup>37</sup> It should be noted that the Action Programme mentions as new proposals the revision of earlier legislation and of those programmes whose implementation was in progress.

<sup>38</sup> Lord Wedderburn: *European Community Law and Workers' Rights after 1992: Fact or Fake?* (1995) in: *Labour Law and Freedom; Further Essays in Labour Law* pp.248; 272-274. See also Bercusson: "Collective bargaining / social dialogue *within* the Member States is regarded as reflecting a balance of power between labour and capital, exercised traditionally through the weapons of industrial conflict." (Bercusson, Brian: *The Dynamic of European Labour Law after Maastricht* (1994) 23 *Industrial Law Journal* p.20.)

where the Commission fully recognises its own competence. The single market will most certainly be characterised by quite profound changes in the structure of employment and of the labour market, and it implies a need for permanent detailed analysis of the employment situation at both macroeconomic and sectoral level, as well as of trends in the structure of unemployment which remains very high despite a significantly high level of job creation."<sup>39</sup>

It is worthwhile to draw up a table indicating whether the measures proposed under each heading fall within the competence of the Community or of the Member States. The exercise leads to interesting conclusions.

	competence	actions proposed
Labour market	Community	regulation 4 other proposals
Freedom of movement	Community	2 regulations 2 Community instruments 2 communications
Employment and remuneration	Member States	opinion, directive
Improvement of living and working conditions	Member States	3 directives, memorandum
Social protection	Member States	2 recommendations
Freedom of association and collective bargaining	Member States	communication
Vocational training	Member States (Community programmes: value added)	Community instrument decision communication joint programme other proposal

<sup>39</sup> Accordingly the initiatives are divided into two large groups: one group consists of activities such as the creation of an observatory and documentation system on employment, the regular publication of the 'Employment in Europe' report with detailed analysis in it, the exchange of vacancies and applications for employment throughout the Community. By the realization of all these activities the jobs available become more visible to all the possible applicants; by the preparation of labour market analysis the changes in relation to labour supply and demand can be more predictable, therefore appropriate measures can be elaborated in due time. The other part of the initiatives targets those groups which to face particularly high risks on the labour market. These vulnerable groups are above all young people under 25 and the long-term unemployed. Their treatment is placed in a larger context, namely that of the activities of the Structural Funds. (COM(89)568 pp.9-13.)

Equal treatment for men and women	Community	Community programme directive 2 recommendations
Information, consultation and participation of workers	Community (generalisation of the principle)	Community instrument Commission instrument
Health protection and safety at the workplace	Community	10 directives recommendation other proposal
Protection of children and adolescents	Community	directive
Elderly persons	Community	communication and decision
Disabled persons	Community	decision directive

The first conclusion which can be drawn from the table is that regulations and decisions, i.e. Community measures which are entirely binding, are proposed only within Community competence. In other cases, when the competence lies with the Member States, directives and other Community or Commission instruments, or soft law measures are proposed.<sup>40</sup> To check whether these measures are appropriate instruments, the main question should be repeated: is the Action Programme able to make national legislation converge and benchmark policies? As far as Directives are concerned, Hepple argues as follows: "Only if the implementing directives have direct effects will they create rights enforceable by individuals in national courts and tribunals<sup>41</sup> and require interpretation of national law in the light of the wording and purposes of the directive."<sup>42</sup> In order to be directly effective they must be 'sufficiently unconditional and precise'.<sup>43</sup> It is by no means clear that all the proposed directives will satisfy this test."<sup>44</sup>

<sup>40</sup> It is particularly noticeable that even despite the lack of proper legal basis, some chapters (8. 10. 11. 12.) fall under Community competence. Under these headings the Commission proposes mainly non-binding instruments under its own discretion.

<sup>41</sup> It should be noted that Directives have only vertical direct effect, meaning in practice, that since Directives are addressed to a Member State, those rights are enforceable only against the state or a state body (public employer), but not against a private employer.

<sup>42</sup> Von Colson (Case 14/83) [1984] ECR 1891, para 26.

<sup>43</sup> Van Duyn (Case 41/74) [1974] ECR 1337.

<sup>44</sup> Hepple, Bob: *The Implementation of the Community Charter of Fundamental Social Rights* (1990) 53 *Modern Law Review* p.650. See also: Szyszczak, Erika: *Future Directions in European Union Social Policy Law* (1995) 24 *Industrial Law Journal* p.26. It is clear that imprecisely drafted directives seeking to establish modern sophisticated social rights create confusion and uncertainty. The process which permits individual EU Member States to transpose Community norms into national statutes places further burden on the ECJ, contributing to additional legal uncertainties based upon unresolved conflicts between national and ECJ

This rather pessimistic picture can be given further depth by remembering that after the Single European Act, the upward harmonisation of social standards was changed by the notion of minimum requirements and in this way the approximation process suffered a qualitative restriction. A further additional element is the increased recourse to soft law measures: The Community retreated into regulatory minimalism. Persistent reference to the subsidiarity principle and repeated praise of the merits of soft law are clear signs of a deliberate passivity.<sup>45</sup> In conclusion, it is hard to imagine that by applying such restricted instruments, the AP can ensure that national legislation or collective agreements have a functionally equivalent outcome. The results are rather disappointing.<sup>46</sup> This disappointment arises from the clear manifestation of the aims, that the parties negotiating the Charter were able to overcome the prejudices and difficulties and put forward a single catalogue of social rights but controversially only a limited set of instruments were available to realise these aims. In Hepple's words this leads one to conclude that if 'fundamental rights' are to have any real meaning they need to be incorporated into the Treaty itself, not left to a non-binding Community Charter and a rag-bag of Directives.<sup>47</sup>

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rulings. (Hardy, Stephen and Adnett, Nick: *'Entrepreneurial Freedom Versus Employment Rights': The Acquired Rights Directive and EU Social Policy Post-Amsterdam* (1999) 9 *Journal of European Social Policy* p.135.)

<sup>45</sup> Simitis, Spiros and Lyon-Caen, Antoine: *Community Labour Law: A Critical Introduction to its History* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*; Liber Amicorum Lord Wedderburn of Charlton p.19; Rhodes, Martin: *The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe* (1992) 30 *Journal of Common Market Studies* p.35.; Lord Wedderburn: *European Community Law and Workers' Rights after 1992: Fact or Fake?* (1995) in: *Labour Law and Freedom; Further Essays in Labour Law* p.254.

<sup>46</sup> The First Report on the Application of the Community Charter of the Fundamental Social Rights of Workers was based solely on the Action Programme. Until 1991 only three proposals had been translated into Directives, two had been taken in the form of Decisions and one soft law measure had been agreed upon out of the 47 initial proposals. The three Directives were the followings: 91/383 on the protection of 'atypical' workers in health and safety matters; 91/382 on the protection of workers from risks related to exposure to asbestos; and 91/533 on the employer's obligation to inform employees of the conditions applicable to the contract on the employment relationship. The first two Directives were based on art. 118/a, thus they were approved by qualified majority, whereas the third Directive had as its legal basis art. 100 requiring unanimity in the Council. (COM(91)511 and Social Europe 1/92.)

<sup>47</sup> Hepple, Bob: *The Implementation of the Community Charter of Fundamental Social Rights* (1990) 53 *Modern Law Review* p.651.

In short, there are four ways in which the social dimension could be promoted: by advocating policy initiatives with a limited outcome; by playing a Treaty-base game and pushing draft legislation through by majority voting; by revising the Treaty itself; or, finally, by creating a new structure of judicial interdependence between EC law and international conventions *via* the accession of the EC to the European Social Charter of the Council of Europe.<sup>48</sup> Any of these options proposes an easy solution but the tendency is clear. There is a limited space within the Treaty for the development of the social dimension and there is a much more crystallised, though theoretical goal, namely the protection of workers' rights. However, a programme for workers' rights under the Charter needs to have within it not merely the rhetoric in support of such rights, but also concrete measures to ensure the realisation of social advance within, but independent of the logic of, the internal market based on free market economics.<sup>49</sup>

## II.

### The Maastricht Treaty and the Social Protocol

#### The Maastricht Treaty: Principles and Citizenship

In the second half of the 1980s the Community was not yet politically equipped to intervene to a greater extent in the determination and regulation of social policies. A good example is the Directive on working. The Commission's original draft recommendation dated back to 1983, but the Council failed to reach an agreement.<sup>50</sup> Then it was proposed again, at this time in the form of a Directive in the framework of the Action Programme relating to the implementation of the Community Charter. The draft used art.118/a as legal basis.<sup>51</sup> The Commission wanted to pass the proposal through the Council by

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<sup>48</sup> Rhodes, Martin: *The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe* (1992) 30 *Journal of Common Market Studies* p.36. and regarding the last option among others: Vogel-Polsky, Eliane: *L'Acte unique ouvre-t-il l'espace social européen?* (1989) *Droit Social* pp.187-88.

<sup>49</sup> Lord Wedderburn: *The Social Charter, European Company and Employment Rights* (1990) p.56.

<sup>50</sup> COM(89)568; Communication from the Commission Concerning the Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, p.18.

<sup>51</sup> OJ C 254/4; 9.10.1990 and amended version OJ C 124/8; 14.05.1991



qualified majority, but the Council challenged the legal basis arguing that its content was more related to employment rights than to health and safety. Apart from the British, there were at least four other governments who rejected the proposal and referred it back to the Commission, giving an unfortunate baptism to the Action Programme.<sup>52</sup>

In accordance with the continuous process of the 'building of Europe' and thanks to the persistence of the advocates of a social dimension, an intensive programme of work was begun to prepare proposals for the improvement of the *status-quo*. The European Parliament adopted a Resolution as early as the beginning of 1989 in which it requested the guaranteeing of fundamental social rights through binding Community instruments. The Resolution enumerates all those rights which should be guaranteed by the Community legal order.<sup>53</sup> After the Strasbourg Summit the Parliament drew the attention of the Council to the inadequacy of the Community Charter and proposed the extension of the scope of art.118/a to all social issues.<sup>54</sup> Then the Parliament further elaborated this argument and urged a greater recourse to majority voting to break the current deadlock around social matters on the legislative agenda.<sup>55</sup>

The ambitious declarations of the Parliament reached the appropriate ears and Delors promised not only to make full use of these proposals,<sup>56</sup> but that a new chapter on the social dimension would be proposed at the Intergovernmental Conference.<sup>57</sup> The

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<sup>52</sup> Lord Wedderburn: *Labour Law and Freedom; Further Essays in Labour Law* (1995) p.252. It should be added, that when the Directive was finally adopted (93/104/EC; OJ L 307/18; 1993) the British still challenged the legal basis, arguing this time that the Directive was in breach of the proportionality principle and that a number of factors relevant to the decision whether action should be taken at Community level had been ignored (UK v Council (Case C-84/94) [1996] ECR I-5755). (De Búrca, Grainne: *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor* (1998) 36 *Journal of Common Market Studies*, p.223.)

<sup>53</sup> OJ C 12/181; 16.01.1989.

<sup>54</sup> OJ C 15; 22.01.1990. It is worth remembering that since the Single European Act, the Parliament has always argued that art.118/a should be interpreted so as to apply qualified majority voting not only to health and safety issues but also to issues relating to the working environment.

<sup>55</sup> see: Resolution on the Commission's Work Programme for 1990, OJ C 68/74; 19.03.1990; and Resolution on the Commission's Action Programme Relating to the Implementation of the Community Charter of Fundamental Social Rights of Workers, 175/90; OJ C 260/167; 15.10.1990.

<sup>56</sup> Delors, Jacques: *Speech on the plenary session of the European Parliament on 17.01.1990*; (1990) 194 EIRR pp.1-2.

<sup>57</sup> Delors, Jacques: *What Social Europe?* Speech on the Fourth Forum of Works Councils, 04.10.1990.

comprehensive proposal of the Commission was then published on 21 October 1990.<sup>58</sup> The Commission envisaged the future Community as a Political Union with inextricably linked economic, social and monetary unions. In order to promote the social union, two particular aspects were targeted: citizenship and social affairs. The basis of European citizenship was proposed in the statement of rights and obligations focusing on (1) basic human rights, with reference to the Strasbourg Convention; (2) the rights of European citizens written into the Treaty, including the rights of residence and movement whether the individual is economically active or not and voting rights in European and local elections; (3) the setting of targets for the definition of the individual's civic, economic and social rights and obligations at a later stage. Under the same heading special attention was devoted to the European level social dialogue.

Regarding the second set of proposals, that of social affairs, the issue was placed in the framework of the optimum development of the single market in which an increase in Community power would concentrate on social affairs, major infrastructure networks and the free movement of persons. In the context of social affairs, the Commission aimed to expand and clarify the provisions of the Treaty in light of the principles laid down in the Community Charter, to allow the Council to adopt directives by qualified majority in areas such as the improvement of living and working conditions, in particular the duration and organisation of working time; forms of employment contracts other than open-ended contracts; and other aspects of employment relations which have a bearing on the protection of workers' fundamental rights, particularly in the case of cross-frontier operations, basic and further vocational training, information and consultation of workers.<sup>59</sup>

Let us turn now to examine how the proposals were transformed into reality. History has shown that as the Single European Act was the treaty of the internal market so

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<sup>58</sup> COM(90)600; Commission Opinion of 21 October 1990 on the proposal for amendment of the Treaty Establishing the European Economic Community with a View to Political Union.

<sup>59</sup> It is of interest to note that the Commission proposed to expand the legal basis exactly in those fields dealt with by the 1989 Charter which were not appropriately or not at all covered by Treaty provisions. See the table sketched out formerly.

was Maastricht for the EMU.<sup>60</sup> Yet as the SEA, the Treaty on European Union similarly included provisions framing the development of the social dimension in particular with regard to the revised general objectives and principles of the Treaty, the new provisions on citizenship and the Social Chapter.<sup>61</sup> However, following the ambitious Commission proposals, the results embodied in the Maastricht Treaty were much more modest.

Under the newly inserted art.B *the Union shall set itself the following objectives: to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of the economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.*

On the basis of the order in which these objectives are stated, one could draw the far-reaching conclusions that the goal of economic and social cohesion appears to be superior to that of economic and monetary union. Frazer argues that the Union endeavours to achieve a wider form of integration and co-operation than the Community and for this purpose many Community functions and provisions were amended. In this respect the absence of any mention of the regulation of competition is significant and this *lacuna* could prove the supremacy of economic and social cohesion over competition rules.<sup>62</sup> However, this optimism can immediately be disproved by the Treaty itself, by art.2 as modified at Maastricht:

*The Community shall have its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred in art.3 and 3/a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting*

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<sup>60</sup> Goetschy, Janine: *The European Employment Strategy: Genesis and Development* (1999) 5 European Journal of Industrial Relations p.119.

<sup>61</sup> Reference should be made to the creation of the Committee of Regions (art.198/a-c); of the Cohesion Fund (art.130/d and Regulation 792/93 establishing a cohesion financial instrument, OJ L 79; 01.04.1993; and Regulation 1164/94 establishing a Cohesion Fund, OJ L 130; 25.05.1994.); and the amendment of the provisions relating to the European Social Fund (arts.123, 126-127).

<sup>62</sup> Frazer, Tim: *The New Structural Funds, State Aids and Interventions on the Single Market* (1995) 20 European Law Review, p.14.

*the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.*<sup>63</sup>

Compared to art.2 of the Rome Treaty the amendment contains new elements both with regard to tasks and to means. The Union intends to realise a further stage of the integration process, the economic and monetary union. True, the objectives are more wide-spread, better balanced between the various sectors, but the underlying goal is still fundamentally economic. Social progress has been granted more emphasis, but building on previous developments as much as on the wording of the Treaty, the sectors where most progress can be achieved are the labour market and employment policies.

According to the Commission proposals, the promotion of social cohesion would have been achieved by the protection of fundamental human rights and by the institution of the European citizenship.

On the subject of fundamental human rights, and limiting the examination to the common provisions of the Maastricht Treaty and of the Community pillar, art.F(2) has to be mentioned, since it states that:

*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

The importance of this article is basically made obsolete by the provision of art.L, which pre-empts the power of the Court of Justice in as much that the Court cannot apply this article in the course of its decision-making.<sup>64</sup> In the light of all this, it would be difficult to argue that substantial progress has been made by the Treaty.

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<sup>63</sup> The sections appearing underlined indicate the modifications inserted by the Maastricht Treaty. This highlighting enables us to identify the amendments easily and precisely.

<sup>64</sup> Gaja, Giorgio: *The Protection of Human Rights under the Maastricht Treaty* (1994) in: Curtin, D. and Heukels, T. (eds): *Institutional Dynamics of the European Integration. Essays in Honour of Henry G. Schermers* Vol.II. p.553; Twomey, Patrick: *The European Union: three Pillars without a Human Rights Foundation* (1994) in: O'Keeffe, D. and Twomey, P. (eds): *Legal Issues of the Maastricht Treaty* p.123;

At Maastricht new provisions were inserted into the Treaty under the heading of Citizenship of the Union, but there was little by way of content. Weiler argues that the idea of European citizenship was designed as a medicine for the problem defined as alienation and disaffection towards the European construct experienced by individuals. This medicine consisted of human rights, more rights, better rights, all in the hope of bringing the Citizen closer to the Union.<sup>65</sup> The political significance is not to be underestimated, but the substance is more an empty declaration than a set of tangible rights and obligations. Most of the rights were already recognised elsewhere, or their content is merely symbolic, and none of the rights enumerated here has direct effect.<sup>66</sup> Taking only one example of the limits of the new provisions: If free movement and the right of residence are extended only under narrow economic conditions protective of welfare benefits in the host Member States, then it is clear that Community citizenship offers little which is not available under the present free movement regime.<sup>67</sup> Some argue that the importance of the Maastricht citizenship provisions lies not in their content but rather in the promise they hold for the future. The argument is that the concept of citizenship is a dynamic one, capable of being added to or strengthened, but not diminished.<sup>68</sup>

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Szyszczyk, Erika: *Social Rights as General Principles of Community Law* (1995) in: Neuwahl, N. and Rosas, A. (eds): *The European Union and Human Rights* pp.215-216.

<sup>65</sup> Weiler, Joseph H.H.: *The selling of Europe: the Discourse of European Citizenship in the IGC 1996* (1996) Harvard Jean Monnet Working Paper 3/96 <http://www.law.harvard.edu/groups/jmpapers/> 11.04.1997.

<sup>66</sup> Gaja, Giorgio: *Introduzione al diritto comunitario* (1999) p.11. Adinolfi, Adelina: *La libertà di circolazione delle persone* (2000) in: Strozzi, Girolamo (ed): *Diritto dell'Unione Europea Vol.II.* pp.71-75. Weiler expresses his views by a metaphor: "Does not art.8 look awfully like one of those *Carnets* of 'free attractions' some tourist authorities distribute to visitors to make them feel welcome and which you accept in the knowledge that the coupons are free because the attractions are not attractive?" (Weiler, Joseph H.H.: *European Citizenship -Identity and Differently* (1998) in: La Torre (ed): *European Citizenship. An Institutional Challenge* p.13.

<sup>67</sup> O'Leary, Siófra: *The Evolving Concept of Citizenship. From the Free Movement of Persons to Union Citizenship* (1996) pp.99; 142.

<sup>68</sup> O'Keeffe, David: *Union Citizenship* (1994) in: O'Keeffe, D. and Twomey, P. (eds): *Legal Issues of the Maastricht Treaty* p.106. Others attribute important consequences to the Union citizenship. See: Hall, Stephen: *Loss of Union Citizenship in Breach of Fundamental Rights* (1996) 21 *European Law Review* pp.129-143.

### The Social Chapter

The Commission's proposal devoted special attention to the promotion of social affairs at the time of the Treaty revision. The initiatives to amend the social provisions (art.117-122) run a thorny path and it is worthwhile highlighting some of the factors which dominated the negotiations, in order to understand better this unique and extremely complex document: the Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland (Social Chapter) attached to the Maastricht Treaty by the Protocol on Social Policy (Protocol No.14).

Since the Community Charter remained a solemn declaration, efforts were made to give it force. Obviously these efforts met with serious resistance from some Member States and the employers' associations.<sup>69</sup> In October 1991 an agreement was reached between the social partners on proposals for amendments to art.118/a and 118/b of the Treaty.<sup>70</sup> However, at Maastricht, at the end of 1991, the British government felt unable to agree on the social provisions to be included in the Treaty and the final solution was to omit the chapter and annex it as a Protocol to the Treaty.<sup>71</sup> The social provisions of the EC Treaty, art.117-122 remained applicable to all 12 Member States and a Protocol was attached to the Treaty in which the 12 agreed to apply the Agreement to 11 Member States.<sup>72</sup> In practice, only very limited use was made of the new tools available. The expanded academic literature proves that the outcome has left a lot to be desired, and the text is open to a large number of possible interpretation. Some should be mentioned here.

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<sup>69</sup> On the negotiations see: EIRR 205, February 1991, p.2; EIRR 209, June 1991, pp.2-3; EIRR 210, July 1991, p.2.

<sup>70</sup> EIRR 214, November 1991, pp.2 and 215, December 1991, p.2 for the correction. At this time the agreement included the British as well. Then these proposals became art.3 and 4 of the Agreement. The Agreement concluded between the social partners has been published by Blanpain, Roger: *Labour Law and Industrial Relations in the European Union; Maastricht and Beyond: from a Community to a Union* (1992) pp.80-81.

<sup>71</sup> EIRR 216, January 1992, p.2.

<sup>72</sup> Some commentators underlined the positive side of the British opting-out, arguing that in principle the Social Protocol could have facilitated efforts to expand EU social policy. Britain's capacity to obstruct legislation was diminished and the four 'poor' states did not command enough votes to block reforms under qualified majority rules. (Leibfried, Stephan and Pierson, Paul: *Social Policy* (1999) in: Wallace, H. and Wallace, W. (eds): *Policy-Making in the European Union* p.192.)

One of the numerous problems regards the legal status of the Social Chapter. The question is whether the Protocol forms an integral part of Community law or whether it is an intergovernmental agreement among those who "wish to continue along the path laid down in the 1989 Social Charter" and consequently falls outside of Community law. Those who argue for its Community-law status stress that in terms of art.239 of the Treaty a Protocol annexed to the Treaty by the common accord of all the Member States has to be considered as an integral part of it. The Protocol's authorisation to the "group of 11" to use the "institutions, procedures and mechanisms of the Treaty" constitutes an amendment of the Treaty.<sup>73</sup>

The alternative possibility is that although the Protocol is a valid act under Community law, the Agreement annexed to it does not form part of Community law, it is a pure international agreement between the 11 governments. In this case, although Community institutions and procedures are borrowed, the directives elaborated under the Agreement have no binding force under Community law and, consequently the Court of Justice will have no jurisdiction given the intergovernmental status of the Agreement which operates in an extra-Community context.<sup>74</sup> Nevertheless, the Agreement might have practical consequences applicable to the UK. Under international law the UK might be bound by legislation resulting from the Social Chapter as part of customary international

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<sup>73</sup> Watson underpins her arguments by comparing Protocols No.11 and 14. The former expressly recognises that the UK is not obliged or committed to the third stage of the monetary union. Such an express suspension of the voting rights of the UK in the Protocol No.14 on Social Policy is missing, a *lacuna* which seems to be a decisive argument to prove that the procedures laid down in Protocol No.14 can be used only for intergovernmental activities. According to Watson this argument lacks conviction. It supposes that Protocol No.14 was adopted with a degree of care and precision which is doubtful, and that the 12 Member States, deliberately, when drafting the Protocol on Social policy chose a form of words different from that in Protocol No.11 in order to indicate that the Agreement on Social Policy was not a Community law act. [...] It seems unlikely that the Member States would have intentionally chosen not to express clearly that the Agreement was intergovernmental in nature but to leave this vital question of its status to be deduced from a combination of a few words of two very different Protocols. (Watson, Philippa: *Social Policy after Maastricht* (1993) 30 CMLRev pp.492-93.)

<sup>74</sup> This opinion is represented by Vogel-Polsky, Eliane: *Evaluation of the Social Provisions of the Treaty on European Union*. Report prepared for the Committee on Social Affairs, Employment and the Working Environment of the European Parliament, DOC EC/CM/202155; PE155.405.I.

law or the Court of Justice relying on the principles of the Social Chapter can develop new general principles of European law.<sup>75</sup>

A further consequence to be considered by the twofold governance of post-Maastricht social policies is that the Treaty provisions are applicable to all Member States and the Agreement applicable only to 11 of them. The existence of twin-track<sup>76</sup> of social policy objectives leads to the assumption that the Member States may selectively apply bits and pieces of policy, a process which threatens the cohesiveness of the entire Community system.<sup>77</sup> The Commission decides which procedure to adopt on a case-by-case basis, and if there is a legal basis in the Treaty with a decision-making procedure which is likely to bring about a decision, as in the field of health and safety at work, the Commission will give priority to instruments which enable a decision to be taken by all the Member States.<sup>78</sup>

The implications of this twin-track approach and the position of the UK can be illustrated by an example: what would be the relationship between the Collective Redundancies Directive and a Directive elaborated under the Social Chapter purporting to amend the original Directive?<sup>79</sup> Such a case would give rise to a situation where a

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<sup>75</sup> Barnard, Catherine: *A Social Policy for Europe: Politicians 1:0 Lawyers* (1992) IJCLLR p.15. For a similar opinion see: Szyszczak, Erika: *Social Policy: a Happy Ending or a Reworking of the Fairy Tale?* (1994) in: O'Keeffe, D. and Twomey, P. (eds): *Legal Issues of the Maastricht Treaty* pp.322-323.

<sup>76</sup> Shaw, Jo: *Twin-Track Social Europe -the Inside Track* (1994) in: O'Keeffe, D. and Twomey, P. (eds): *Legal Issues of the Maastricht Treaty* p.295.

<sup>77</sup> Curtin, Deirdre: *The Constitutional Structure of the Union: A Europe of Bits and Pieces* (1993) 30 CMLRev. pp.54; 57. The behaviour of the UK served in fact as a precedent for subsequent agreements allowing Denmark to opt-out of several sections of the Maastricht Treaty. Bercusson and van Dijk refer to the same phenomenon though apply different categories. They argue that the situation to be faced is the first manifestation of the *a la carte* principle, when Member States failed to agree on final common goal. This principle is contrasted to the concept of the two-speed Europe, where the final goal is common, the only difference is the time period within this goal should be reached. For this concept an example is Protocol No.11 on the economic and monetary union where an explicit mechanism for the British opting-in is provided. The Protocol on Social Policy does not contain such a provision. (Bercusson, Brian and van Dijk, Jan Jacob: *The Implementation of the Protocol and Agreement on Social Policy of the Treaty on European Union* (1995) 11 IJCLLR pp.5-6.)

<sup>78</sup> COM(95)184 Report on the Community Charter of the Fundamental Social Rights of Workers and on the Protocol on Social Policy annexed to the Treaty establishing the European Community. The Commission has expressed a conviction since the very beginning that the Agreement extended and clarified Community competence. (COM(93)600 Communication concerning the application of the Agreement on social policy)

<sup>79</sup> Fitzpatrick, Barry: *Community Social Law after Maastricht* (1992) 21 Industrial Law Journal p.203.



different degree of employment protection were provided in the UK from the rest of the EC. This different degree of protection would very probably make labour cheaper in the UK, promoting not only inward investment but at the same time causing tensions among the Member States.<sup>80</sup>

The Social Chapter brought about important innovations yet with numerous ambiguities regarding their implementation. These innovations concern on the one hand the objectives, on the other the *modus operandi* of the Agreement.<sup>81</sup> The objectives (art.1) of the Agreement relate to the imprecise and programmatic list contained in art.118 of the Rome Treaty and provide that: *"The Community and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of social exclusion."* Art.119 of the Treaty was reconfirmed by the Agreement and supplemented by a provision which allows Member States to take measures to make it easier for women to pursue a vocational activity or to prevent or compensate for their disadvantaged position in their professional careers.

Art.2(1) of the Agreement widens the issues on which legislation can be based on qualified majority voting:<sup>82</sup> improvement of health and safety at the workplace; working

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<sup>80</sup> In connection with the Hoover case, Jacques Delors remarked that the opt-out of Britain from the Social Chapter made it a paradise for foreign investment. Mr Major, the then UK Prime Minister, replied that the consequences of the Social Chapter were increased costs and destruction of jobs and competitiveness whereas Britain had managed to retain one of the most flexible workforces in the world. (EIRR 230, March 1993, pp.14-19.) The editorial comment of the CMLRev spells out a more direct statement: the opt-out of the UK from the Social Chapter, its failure to work towards harmonization with the other Member States, leads to an institutionalised invitation to social dumping. (30 CMLRev, Editorial comment, (1993) p.448.) At the same time it also has to be noted that when the EWC Directive entered into force many, though not all of the more than 100 British companies affected by the EWC Directive, set up EWCs with voluntary seats for their British workforce alongside the rest. The first wholly British owned multinational company which set up EWC including its British workers was United Biscuits in the autumn of 1994. See: Wedderburn: *Consultation and Collective Bargaining in Europe: Success or Ideology?* (1997) 26 Industrial Law Journal p.21. and *European Works Council: the action begins* (1994) EIRR, 250. p.15.

<sup>81</sup> These innovations have special importance with regard to the incorporation of the Agreement into the text of the Treaty at Amsterdam, making it applicable to all Member States.

<sup>82</sup> By way of derogation from art.148(2) when a proposal requires a qualified majority decision in the Council for adoption, at least 44 votes (out of the 66) have to be received in favour instead of the 54 votes (out of the 67) as it is the rule in case of normal majority voting. See art.2 of the Protocol.

conditions; the information and consultation of workers; equality between men and women with regard to labour market opportunities and treatment at work; and the integration of workers excluded from the labour market. The inclusion of the wide scope of working conditions puts an end to the struggles concerning the conceptual interpretation of art.118/a, whether qualified majority voting introduced by the SEA relates to the working environment in general or only to health and safety matters. Under art.2(1) of the Social Chapter all the issues connected to working conditions can be legislated by way of the qualified majority, thus making the veto established by art.100/a(2) meaningless, at least in relation to the 11 Member States.

The following subjects have remained under the unanimity regime (art.2(3)): social security and social protection of workers; protection of workers where the employment contract is terminated; representation and collective defence of workers and employers, including co-determination; conditions of employment of third-country nationals legally residing in Community territory; financial contribution for promotion of employment and job-creation. In practice, it is difficult to predict how the demarcation between regulation by qualified majority and by unanimity can be made, taking the example of information and consultation of workers and of representation and collective defence of workers and employers including co-determination.<sup>83</sup>

Contrary to the general enlargement of Community competence in the social field, the Agreement introduced important restrictions: the issues of pay, the right of association, the right to strike and the right to impose lock-outs remain in the exclusive competence of the Member States (art.2(6)). The right of association, more than any other right, would have constituted a fundamental pillar of the Agreement which, as we will see, treats social dialogue as a key component of any future European social integration. In this

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<sup>83</sup> Weiss argues that this ostensibly clear difference can lead to absurd results given the examples of the Vredeling proposal regarding the information and consultation of workers (OJ C 217/3; 12.08.1983) and of the proposed EWC Directive (OJ C 39/10; 15.02.1991). The former requires qualified majority whereas the latter requires unanimity, notwithstanding that both proposals aim to regulate the same subject matter. The EWC Directive abandoned the rigid structure and detailed approach of the Vredeling Directive, in favour of more flexibility, due to the new mode of representation. (Weiss, Manfred: *The Significance of Maastricht for European Community Social Policy* (1992) IJCLIR pp.7-8.)

sense the set of "constitutionalised" union rights would be considered a prerequisite for any effective institutional pluralism, and concrete preconditions for "post-regulatory" developments in Community law.<sup>84</sup>

Some further restrictions significantly limit the scope of Community intervention. Legislation is subject to five principles: the measures have to be adopted to support and complement the activities of the Member States; they must have regard to the conditions and technical rules obtaining in each of the Member States; the Council shall abstain from imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized enterprises; the measures adopted must maintain the competitiveness of the Community; the measures must contain minimum requirements for gradual implementation. In the academic literature there is a debate as to how much the hands of the Council are tied,<sup>85</sup> but it is clear that the Community can only complement the activities of the Member States in the field of social policies.

The *modus operandi* of the Social Chapter led to a great number of contributions to a sophisticated academic discussion. The main innovation was to override the vague wording of art.118/b, after that the seeds were sown for a nascent social policy where collective agreements could be used in place of legislation,<sup>86</sup> the role of the social partners was proceduralised.<sup>87</sup> The role of the social partners can be classified under three

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<sup>84</sup> Lo Faro, Antonio: *EC Social Policy and 1993: The Dark Side of European Integration?* (1992) 14 *Comparative Labor Law Journal* p.22; Sciarra, Silvana: *Collective Agreements in the Hierarchy of European Community Sources* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.195.

<sup>85</sup> Watson, Philippa: *Social Policy after Maastricht* (1993) 30 *CMLRev* p.500; Blainpain, Roger: *Labour Law and Industrial Relations in the European Union; Maastricht and beyond: from a Community to a Union* (1992) p.33; Some explanation is given by the Commission itself, it aims to implement both the 1989 Charter and the Agreement according to the following principles: the principle of subsidiarity, the respect of national divergency, the promotion of European competitiveness. (COM(95)184, Report on the Community Charter of the Fundamental Social Rights of Workers and on the Protocol on Social Policy annexed to the Treaty establishing the European Community, p.1 bis)

<sup>86</sup> Barnard, Catherine: *A Social Policy for Europe: Politicians 1: 0 Lawyers* (1992) 8 *IJCLLR* p.29.

<sup>87</sup> Wedderburn insisted in his speech in the British Parliament on the Social Protocol that the document contains procedures though it was often publicised as it were a set of substantive norms for employment law. (Wedderburn: *Appendix to Chapter 8 on the Maastricht Social Chapter* in: *Labour Law and Freedom; Further Essays in Labour Law* (1995) p.283.)

functions: implementative (art.2(2)), consultative (art.3(1,2,3,)) and normative (art.3(4) and art.4).<sup>88</sup> According to the implementative function, the procedure follows the traditional path in that the Council, on the proposal from the Commission, decides either by qualified majority voting or by unanimity. The new element is that the Member States may entrust the social partners, at their joint request, with the implementation of the Directive to be adopted.

The consultative function already raises various difficulties. In this procedure the Commission has the task of promoting the consultation of management and labour, and before submitting proposals in the social policy field it must consult the social partners on the possible direction and content of the Community action. The most frequent problems in doctrinal discussions are the representativeness of the social partners<sup>89</sup> and whether the social partners shall or can forward an opinion to the Commission.<sup>90</sup>

The procedure in which the social partners are entrusted with normative power is considered as the most resourceful one.<sup>91</sup> In this case the dialogue between the social partners might lead to European level collective agreements. It is up to the signatory parties whether they implement the European level agreement according to the procedures

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<sup>88</sup> Lo Faro, Antonio: *Maastricht ed oltre. Le prospettive sociali dell'Europa comunitaria tra resistenze politiche limiti giuridici ed incertezze istituzionali* (1993) *Diritto delle relazioni industriali* No.1. p.140.

<sup>89</sup> On the selection of the social partners for participation in the Community level social dialogue see: (COM(93)600; adapted version: COM(98)322, annex 1. p.24.) This selection was challenged by the Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) which was unable to participate in the dialogue between management and labour on parental leave (Case T-135/96). See further on this point: Marie-Ange Moreau: *Sur la représentativité des partenaires sociaux européens* (1999) *Droit Social* pp.53-64. Treu remarks that the social partners made a fortune of their past experience but at the time of the Maastricht Agreement any of the negotiating parties have a complete contracting power. Treu, Tiziano: *L'Europa Sociale: dall'Atto Unico a Maastricht* (1991) *Quaderni di Diritto del Lavoro e delle Relazioni Industriali*, No.10. p.24.

<sup>90</sup> Fitzpatrick, Barry: *Community Social Law after Maastricht* (1992) 21 *Industrial Law Journal* p.201; Watson, Philippa: *Social Policy after Maastricht* (1993) 30 *CMLRev* p.502.

<sup>91</sup> An ambiguity arises as to the timing of the initiation of the special procedure referred to in art.3(4). The wording of the article states that the procedure may be initiated by the social partners "on the occasion of such consultation". The question is: according to art.3 before, or after the Commission produces its proposal? This situation is labelled by Bercusson as 'bargaining in the shadow of the law' since there is pressure on the social partners to negotiate and to reach an agreement, in order to avoid an imposed standard which pre-empts their autonomy, and which may also be a less desirable result. (Bercusson, Brian: *Maastricht: a fundamental change in European labour law* (1992) 23 *Industrial Relations Journal* p.185. and *The Dynamic of European Labour Law after Maastricht* (1994) pp.20-21.)

and practices specific to management and labour in the Member States or, at their joint request, by means of a Council decision. Recourse to the first option has so far been avoided, since the issue raises serious obstacles.<sup>92</sup> The social partners have always preferred the option of transforming their agreement into a Community instrument.<sup>93</sup>

Summarising this examination of the elements of the social dimension, one can confirm that the context in which European social policy is embedded is primarily employment-related. It is well-illustrated by the Community Charter inasmuch the initiatives inspired by the Charter, but based on the Treaty, had to change in order to fit into the existing legal order. The Charter aimed to guarantee social rights, whereas the Action Programme pointed to employment protection and to the implementation of labour market policies. In the words of Vogel-Polsky, the central problem no longer relates to the rights of labour, but to the labour market.<sup>94</sup>

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<sup>92</sup> The transposition of European-level agreements via collective sources opened up a major debate which dates back to a period before the Maastricht Agreement. See on this point: Adinolfi, Adelina: *The Implementation of Social Policy Directives through Collective Agreements?* (1988) 25 CMLRev pp.291-316; Curtin, Deirdre: *Directives: The Effectiveness of Judicial Protection of Individual Rights* (1990) 27 CMLRev pp.715-716; Wedderburn and Sciarra, Silvana: *Collective Bargaining as Agreement and as Law: Neo-Contractualist and Neo-Corporative Tendencies of our Age* (1988) in: Pizzorusso (ed): *Law in the Making* pp.186-237; Treu, Tiziano: *L'Europa sociale: dall'Atto Unico a Maastricht* (1991) Quaderni di Diritto del Lavoro e delle Relazioni Industriali No.10. p.21; Wedderburn: *Inderogability, Collective Agreements, and Community Law* (1992) 21 Industrial Law Journal pp.245-264; Bercusson, Brian and van Dijk, Jan Jacob: *The Implementation of the Protocol and Agreement on Social Policy of the Treaty on European Union* (1995) 11 IJCLIR pp.26-27; Wedderburn: *Consultation and Collective Bargaining in Europe: Success or Ideology?* (1997) 26 Industrial Law Journal p.30. On the position of the ECJ see: *Commission v Italy* (Case 91/81) [1982] ECR 2133 (collective redundancies); *Commission v Italy* (Case 235/84) [1986] ECR 2291 (transfer of undertaking); *Commission v Denmark* (Case 143/83) [1985] ECR 427 (equal pay).

<sup>93</sup> Directive 96/34 on parental leave, OJ L 145; 19.06.96. Amended by: Directive 97/75; OJ L 10; 16.01.1998. (extension to the UK); Directive 97/81 on part-time work, OJ L 14; 20.01.1998. Amended by: Directive 98/23; OJ L 131; 05.05.1998. (extension to the UK), Directive 99/70 on fixed-term work, OJ L 175, 10.07.1999.

Directive 94/45 on the European Works Council was adopted on the basis of the Social Chapter, the Social partners had a consultative role (art.3(2, 3)). OJ L 254, 30.09.1994. Amended by Directive 97/74, OJ L 10, 16.01.1998. (extension to the UK)

<sup>94</sup> Vogel-Polsky, Eliane: *What Future is There for a Social Europe Following the Strasbourg Summit?* (1990) 19 Industrial Law Journal p.72.

The Maastricht Treaty tried to remedy the situation, but the introduction of Union citizenship was not convincing. The Social Chapter brought about important innovations, such as the enlarged scope of majority voting. The other innovation concerns the social partners. The power granted to the social partners to pre-empt EC initiatives confers a (formal) priority to the consensual method over authoritative norms as a source of Community-law.<sup>95</sup> With the participation of the Commission, a trilateral regulatory model is consolidated, not only factually but also legally.<sup>96</sup> However, these merits could be better transformed into tangible reality if the social provisions were channelled into a single binding document which would, if not completely resolve, but at least reduce the uncertainties, ambiguities and contradictions.

In this chapter two documents were discussed, of which the Community Charter was dealt with in more detail. This was so because the Charter shaped the social dimension of the Community in a particular way: it made clear that the existing legal and political conditions did not allow for the protection of social rights. The delimited field of action is the labour market. Still the question remains what are the values and conditions which guide interventions in this field.

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<sup>95</sup> Treu, Tiziano: *European Collective Bargaining Levels and the Competences of the Social Partners* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.173.

<sup>96</sup> Simitis, Spiros: *Europeizzazione o rinazionalizzazione del diritto del lavoro?* (1994) *Giornale di diritto del lavoro e di relazioni industriali* No.64. p.657; Sciarra, Silvana: *Collective Agreements in the Hierarchy of European Community Sources* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.199.

## Chapter V

### THE PROCESS LEADING TO AMSTERDAM AND THE NEW TITLE ON EMPLOYMENT

So far the analysis of the evolution of the social dimension has focused on scrutiny of the Treaties and of documents closely connected to them. The conclusion reached is that the social dimension exists in a "regulatory gap", inasmuch Community competences in social matters have remained limited and difficult to apply; and the Member States' Treaty obligations have made it more difficult for them to exercise fully the regulatory competences they still retain.<sup>1</sup> These legal limits, however, did not mean that social issues were not at the centre of European debates. In the post-Maastricht era, such a large number of Community documents were produced that it is difficult to point to the most important ones which decisively influenced the development of European social policies.

In the following, a colourful picture will be sketched out which might equally give an impression of being eclectic: in fact the aim is to present, from a variety of viewpoints, those problems which emerged in the post-Maastricht era. Economic perspectives on social policy will be explored, as well as the practical outcomes of policies pursued, the Commission's choices over social policy, in the lead up to the Amsterdam Treaty. The multiplicity of approaches makes possible to consider a large variety of sources to bolster the analysis.<sup>2</sup> None of the documents discussed provides a comprehensive solution. Or, in other words, what is proposed is a flexible process involving a large number of actors. The future destiny of the social dimension can be discovered by reading between the lines, by the careful articulation of the sources.

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<sup>1</sup> Dehousse, Renaud: *Integration v. Regulation? Social Regulation in the European Community* (1992) p.15.

<sup>2</sup> The law has important functions in labour relations but they are secondary compared to the impact of the labour market, that is supply and demand. (Davies, P. and Freedland, M. (eds): *Kahn-Freund's Labour and the Law* (1983) p.19.)

Reference will be made to the economic point of view to argue that labour standards are not necessarily hostile to competitiveness, on the contrary, they can contribute to it. Still another perspective, that of the Court of Justice, will illustrate the lack of awareness of the interaction between labour and competition law. The discussion will examine a series of cases where the ECJ refused to reach a balance between social and economic values, excluding social values *a priori* from its considerations.

Regarding the value choices of the Commission, the need to codify labour standards was recognised, but an important shift occurred when the proposed measures came to be discussed: no legislation was proposed, but in line with previous developments in the social policy area, only policy initiatives were suggested. The chance to codify rights was ultimately weakened by the repeated recourse to the principle of subsidiarity. At the same time the role of Community social policies was fundamentally reevaluated: their importance as a method of compensation or redistribution was downplayed, they were now considered as a prerequisite for economic growth. Other issues appeared in need of Community level solutions: unemployment and poverty.<sup>3</sup> These phenomena shaped the proposals for the impending Treaty modification: the elaboration of a comprehensive Community labour market policy which could compel the Member States to present measurable performance both in quality and in quantity.

Before examining the provisions introduced by the Amsterdam Treaty, further elements will be added to the already colourful picture: the practical impact of policy measures proposed at Community level. The areas chosen characterise the vocabulary of the era: shift from passive to active labour market policies, and the increased recourse to local initiatives. These implications underline the practical difficulties national and local actors have to face.

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<sup>3</sup> Unless the capacity of European institutions to take public and private action in social affairs increases, thus providing a problem-solving potential at European level, there will be nothing to compensate for the loss of Member States' power to take unilateral action. (Falkner, Gerda: *European Social Policy. Towards multi-level and multi-actor governance* (1999) in: Kohler-Koch, B. and Eising, R. (eds): *The Transformation of Governance in the European Union* p.97.)



The process of reforming labour market policies launched at the Essen European Council served as a blueprint and was consolidated in the Amsterdam Treaty.<sup>4</sup> The new Title on employment does not provide for a static solution, but offers a process which enables continuous adaptation and fine tuning both on the part of the Community and the Member States. This dynamism is boosted by the Employment Guidelines, which endow the Commission with a central role. The Commission's ceaseless activity in setting specific targets compels Member States not so much towards co-ordinating their performance, but more toward making their policy indicators converge, yet with a relative freedom respecting national practices. The new provisions do not resolve all theoretical and practical problems, but there is some evidence that the European Employment Strategy is functioning and Member States are adapting their national policies to Commission guidance.

#### The economic appraisal

The purpose of this section is to prove from an economic point of view that the protection of labour standards is not necessarily incompatible with competitiveness, using the analyses of Mückenberger, Deakin and Wilkinson. They attempt to disprove those arguments which link Keynesian-style demand-management with trade union control of labour markets as the twin causes of high unemployment and chronic inflation. According to this view, the institutional control of wages by collective bargaining is incompatible with the performance of the market, and the market is thereby deprived of the function of guiding labour to where it can be sold.<sup>5</sup> Putting it more simply: wages should be determined by supply and demand, based strictly on market forces. Social justice limits the effectiveness of the market and preserves the jobs of protected workers at the expense of the unemployed. According to the same line of argumentation an influential Commission document argues that social protection schemes have -in part at least- had a negative impact on employment in that they have, in the main, tended to protect people

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<sup>4</sup> Kenner, Jeff: *The EC Employment Title and the 'Third Way': Making Soft Law Work?* (1999) 15 IJCLIR p.48.

<sup>5</sup> Mückenberger, Ulrich and Deakin, Simon: *From deregulation to a European floor of rights: Labour law, flexibilisation and the European single market* (1989) ZIAS pp.172-73; 177 ff.

already in work, making their situation more secure and consolidating certain advantages. They have in effect proved to be an obstacle to the recruitment of job-seekers or of new entrants to the labour market.<sup>6</sup>

Mückenberger and Deakin argue that the above statements lack all practical and theoretical validity. They cannot accept that the market operates without the need for any but the most minimal forms of state regulation. They criticise the ideology for offering no convincing economic explanation for market imperfections. The ideology holds that if markets do not function properly it is due to non-economic factors. Thus, shifting the reasoning closer to our discussion, social inequality in employment is ascribed to pre-market differences in the capacity of individuals and in their motivation. Labour market discrimination is assumed to arise from employers' subjective tastes for discrimination or from the employees' choice to carry out activities other than those offered by the market.

The critical approach of Deakin and Wilkinson towards the market paradigm and deregulation is based on the argument that the invisible hand of market forces does not lead to equilibrium of supply and demand but, in addition to producing imperfections, market forces are inefficient, and are better adjusted by regulation.<sup>7</sup> Labour supply is to a large extent differentiated by individual's socialisation, access to education and training facilities or by the distribution of domestic, family and other responsibilities. Such tendencies create non-competing groups which widen the income and job opportunities of members and limit of those of non-members. The inequality of opportunities is not confined to labour. Employers are also structured in a hierarchy based on relative market power. Influential companies can dictate not only the terms of trade, but they can also make more effective use of the weakness of disadvantaged labour as well. The distribution of income and economic opportunities is largely determined by the power relationship, and the greater the disadvantage suffered by workers in the labour market, the more their

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<sup>6</sup> The White Paper on Growth, Competitiveness and Employment, Chapter 8. Turning growth into jobs; p.140.

<sup>7</sup> Deakin, Simon and Wilkinson, Frank: *Labour standards -essential to economic and social progress* (1996) pp.8-13.

labour is undervalued. This situation necessitates regulation to counteract inequalities in labour market opportunities, and benefits to limit the major source of inefficiency.<sup>8</sup>

The employment of undervalued labour has effects which illustrate the need for regulation. The most obvious case is when labour costs are reduced, and a firm can thus lower its costs, and improve its position on the market. This advantage is only temporary and price competition can only be destructive. Meanwhile a 'low cost' firm can survive through the direct competition it hampers the others to invest in new technologies and products. Long term competitiveness depends more on quality than simply on low price. Low price competition decreases profit margins continuously which rules out long term considerations, prevents investment into research and innovation, and threatens quality. On a wider scale, price competition would not lead anywhere but to a fall in employment because the effective demand would fall.<sup>9</sup>

As with low pay, poor working conditions also undermine workers' efficiency. The quality of working conditions is relevant in various respects. The most direct connection is that a dangerous and unhealthy work environment has immediate implications for productivity: time and money are lost through injury. Working conditions in a wider context have a central role to play in gaining the support of workers for the aims of the firm. This is best served by co-operation between employees' representatives and management and by instituting a "floor of rights"<sup>10</sup> which includes the rights to association

<sup>8</sup> Here the strong interrelation between economics and labour law can be seen by recalling a substantially equivalent statement from a legal point of view: "If there is no firm base provided for the inderogable rights of workers and of collective bargaining it would feed the lack of balance in the position of the working contract and it would give free way to the market which in itself is not a source of just rules." (Sciarra, Silvana: *Uno "strabismo di Venere": Le politiche sociali comunitarie verso il completamento del mercato interno* (1991) 22 Prospettiva Sindacale p.38.)

<sup>9</sup> Teague, Paul: *The EC: The Social Dimension; Labour Market Policies for 1992* (1989) p.78.

<sup>10</sup> The category of floor of rights is elaborated by Lord Wedderburn. Labour standards are settled as forms of regulation and they can be substantive, procedural or promotional in their nature. The substantive standards directly regulate the individual employment relationship and these standards form a floor of rights, or set of minimum provisions on which other conventional sources can improve, but from which they may not derogate except under prescribed conditions. The procedural standards aim to provide legal support for the mechanism of collective representation and/or negotiation of workers and employers. The promotional standards are concerned with enhancing labour market opportunities through active labour market policies. (see in particular: Lord Wedderburn: *Inderogability, collective agreements and Community law* (1992) 21 Industrial Law Journal p.250.)

and to participation. Treating individual workers well, and granting them rights such as benefits in the case of the termination of the employment contract, or benefits depending on the length of service, participation in a supplementary pension scheme involving an employer's contribution, also enhance loyalty towards the company, and greatly contribute to better performance in terms of productivity.<sup>11</sup> The arguments briefly delineated here tell us that, although labour standards inevitably regulate competition, they are not completely hostile to it; but rather, they have a role to play as inputs into the competitiveness of European economies.<sup>12</sup> This suggests that EU social policy can be designed to make economic and social rights complementary in an economic system devoted to sustaining and creating high productivity employment.<sup>13</sup>

There is an additional element substantially limiting the application of an economic model on labour which assumes the full exercise of market forces, such as freedom of movement both on the supply- and demand-side, totally protected from regulatory interference. The deeply-rooted historical and national traditions describe an essential characteristic of labour, differentiating labour from a mere commodity or pure economic factor.

For the same reasons, uncritically copying the apparently successful American model, as at times proposed, is unacceptable. Although it does not mean that certain practices and patterns could not be transplanted into a European environment. Behind the, at times, attractive statistics on the American method of job creation, the reality is much more miserable. Most of the jobs created in the US during the 1980s were referred to as

<sup>11</sup> According to the analysis provided by Mückenberger and Deakin, labour standards have triple function: protective, selective and incentive. They protect against the power of employers to conduct a contractual relation without constraint; the selective function is fulfilled by the introduction of a qualifying threshold to acquire certain benefits; and the incentive function is served by the institutions which encourage individuals to pursue continuous employment. (Mückenberger, Ulrich and Deakin, Simon: *From deregulation to a European floor of rights: Labour law, flexibilisation and the European single market* (1989) ZIAS pp.159-160.)

<sup>12</sup> Deakin, Simon: *Labour Law as Market Regulation: the Economic Foundations of European Social Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.93.

<sup>13</sup> Hardy, Stephen and Adnett, Nick: 'Entrepreneurial Freedom Versus Employment Rights': *The Acquired Rights Directive and EU Social Policy Post-Amsterdam* (1999) 9 *Journal of European Social Policy* p.130.

"poor quality" jobs and they had a low-productivity effect on the economy.<sup>14</sup> Other authors comment that the majority of the newly created jobs in the US were in low-wage industries, the working contracts were fixed-term and, generally speaking, excluded from social benefits and paid holidays and included a large amount of extra working hours. Although the employment rate has increased in recent years, many women were pushed onto the job market because of the falling income of their husbands.<sup>15</sup> Apart from the greater flexibility of the American labour market compared to the European one, other factors, such as fiscal and monetary systems contributed to a large extent to the favourable economic climate. Labour market flexibility alone would not have resulted such a progress.<sup>16</sup>

#### The manifestation of labour law: conflict between competition law and welfare

The fundamentally economic direction of the European integration process does not mean that other than market values did not strike the path for recognition. This struggle can be well illustrated by the conflicting values in cases brought before the Court of Justice, where economic freedoms guaranteed by the Treaty were found to contradict fundamental social values laid down in national legislation. The Court avoided balancing process between the sets of values, it did not make choices, it favoured the principles of market integration. The Luxembourg judges dealt with each question brought before them on the basis of rules of different Community policies, thus creating a jurisprudence which might be described as 'oblique'.<sup>17</sup> Notwithstanding this, the mere recognition of such a

<sup>14</sup> Deakin, Simon and Wilkinson, Frank: *Rights vs Efficiency? The Economic Case for Transnational Labour Standards* (1994) *Industrial Law Journal* p.298.

<sup>15</sup> Freeman, Richard B.: *Working Under Different Rules* (1994) p.5.

<sup>16</sup> For other contributions to the same discussion see: *The U.S. "Employment Miracle": Employment Protection and Job Generation* contributions of Robert Choate; John T. Addison; Jan Herin; Harry C. Katz; Sheldon Friedman and Christian Weller; Alan B. Frueger and Jörn-Steffen Pischke. (1998) 19 *Comparative Labor Law and Policy Journal* p.280.

Deakin and Wilkinson call the attention that though the UK is considered as the best student in the class to apply the American labour market patterns and to exercise deregulation, since 1979 thirty changes have been made to the way as unemployment is officially counted, all but one of which have reduced recorded unemployment. The official definition of unemployment has also been changed from one based on persons registered as unemployed to the one based on *claimants*. (Deakin, Simon and Wilkinson, Frank: *Labour standards -essential to economic and social progress* (1996) p.4.)

<sup>17</sup> Roccella, Massimo: *Tutela della concorrenza e diritti fondamentali nella giurisprudenza sociale della Corte di Giustizia* (1993) 57 *Giornale di diritto del lavoro e di relazioni industriali* p.1.

conflict illustrates the growing importance of social values, even if they are still considered as stepsister of market integration.<sup>18</sup>

Some of the most important cases in the context of Sunday trading, state aids and public monopolies can illuminate the underlying reasoning. In the Sunday trading cases<sup>19</sup> the main question was whether the ban on Sunday trading could hamper the free movement of goods in an indirect but still discriminatory way, and whether this ban was therefore incompatible with the provisions of art.30.<sup>20</sup> The Court did not discuss labour law issues, such as working time or weekly rest, or national traditions on the nature of Sundays.<sup>21</sup> Evidence was adduced, and accepted by the Court, that the ban on Sunday trading affected the volume of trade between Member States, but that it did not discriminate in favour of domestic production, since the ban was applied irrespective of the origin of products. The Court limited its reasoning to this issue, it did not take the initiative to reconcile the values of the common market and the free movement of goods, on the one hand, and on the other the special character of Sundays, or to protect employees from having work on Sundays. The Court was satisfied with the reasoning that there was no discrimination regarding the origin of the goods, thus the Treaty provisions were not infringed.<sup>22</sup>

<sup>18</sup> Lange, Peter: *Maastricht and the Social Protocol: Why did they do it?* (1993) 21 Politics and Society p.28.

<sup>19</sup> Torfaen B C (Case C-145/88) [1989] ECR 3851; Rochdale B C (Case C-306/88) [1992] ECR I-6457; Reading B C (Case C-304/90) [1992] ECR I-6493; Stoke-on-Trent CC (Case C-169/91) [1992] ECR I-6635; Conforama (Case C-312/89) [1991] ECR I-997; Marchandise (Case C-332/89) [1991] ECR I-1027; 't Heukse and Boermans (Joined Cases C-401/92 and C-402/92) [1994] ECR I-2199; Punto Casa and PPV (Joined Cases C-69/93 and C-258/93) [1994] ECR I-2355.

<sup>20</sup> Art.30: *Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.*

<sup>21</sup> In an earlier case on hours of work in bakeries the Court recognised that the national regulation forms part of the national choice on economic and social policy. Oebel (Case 155/80) [1980] ECR 1993 (Barnard, Catherine: *Sunday Trading: A Drama in Five Acts* (1994) 57 Modern Law Review p.452.)

<sup>22</sup> In Punto Casa case ((Joined Cases C-69/93 and C-258/93) [1994] ECR I-2355.) the Court was found in an even easier situation. Though the case followed some previous ones on the same subject (Torfaen, Stoke-on-Trent, Marchandise), the Court did not have to refer to the judgement and reasoning of previous cases, as the interpretation of art.30 was reviewed in the Case Keck (Joined Cases 267, 268/91) saying that: "trade limitation does not constitute a direct or indirect discrimination against goods of other Member States if this limitation is applicable to all actors and to the whole national territory."

The conflict of social and economic values was more direct in the cases concerning state aids, namely in *Sloman Neptune*<sup>23</sup> and *Kirshammer-Hack*.<sup>24</sup> In the first case, Germany created a special shipping register for ships engaged in international trade. Owners of ships on this register were entitled to recruit as crew members workers who were not resident or domiciled in Germany, nor did they have to apply German law on employment contracts just because the ships were flying under German flag. In the given case, the ship owner engaged Philippine crew members under the collective agreement negotiated with the Philippine trade union, leading to pay levels at about one-fifth of that payable to German crew members under the relevant German agreement. The question raised before the Court was whether this specific advantage constitutes an illegitimate state aid or not.

In the other case, the plaintiff sued the employer because of unfair dismissal. The employer in question was exempted from the relevant dismissal provisions, on the grounds of employing not more than 5 employees. In this case, as in the earlier case, the central problem was whether the employer benefited from an illegitimate state aid by being exempted from the costs of a dismissal procedure.

Although the involvement of labour law issues was obvious, the Court excluded labour law provisions *in limine*. The reasoning of the Court was limited to competition law arguments, and the Court held that art.92 is applicable only if a transfer of state resources leads to an advantage for an undertaking. In the cases in hand, the advantage was conferred as a result of state authority, consequently the creation a special ships' register and the exemption of certain employers from the dismissal procedures did not constitute an illegitimate state aid.<sup>25</sup>

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<sup>23</sup> *Sloman Neptune* (Joined Cases C-72 and 73/91) [1993] ECR I-887.

<sup>24</sup> *Kirshammer-Hack v Sidal* (Case C-189/91) [1994] ECR I-6185.

<sup>25</sup> Roccella comments that in the *Sloman Neptune* judgement, that the Court refused to condemn the national rule in question which would have been possible if it had taken into consideration the interpretation of state aids advocated by the Commission. The Commission argued that an economic advantage, even if it is not directly financed from state resources, but it operates to the detriment of others, has to be treated as a state aid. (Roccella, Massimo: *La Corte di giustizia e il diritto del lavoro* (1997) p.18.) It is similarly strongly arguable, that it is precisely in smaller undertakings where the employee has the greatest need of the protection provided by the law. (Davies, Paul: *Market Integration and Social Policy in the Court of Justice*

There is a further group of cases where the privileging of economic values and the perfect functioning of market forces is even more significant. In the *Macrotron*<sup>26</sup> and *Merci*<sup>27</sup> cases, the ECJ repeatedly refused to balance between national social policy choices and the interests of market integration. In both cases, public monopolies lay at the heart of the problem. In *Macrotron*, a monopoly was granted to the Federal Employment Office (FEO) under German legislation according to the ILO Convention No. 96 of 1949. The key issue in the case was whether the German government was in breach of Art.90 by maintaining in force the FEO's monopoly over executive recruitment. The ECJ held that the grant of the monopoly in a situation in which the grantee is not able to meet the demand for the services subject to the monopoly does involve the breach of art.90 by the state granting the monopoly.<sup>28</sup>

In *Merci* the specific protection granted to certain workers was emphasised: a monopoly was granted to certain companies engaged in dock work in order to avoid casual work to which the industry is particularly prone. The relevant company, *Merci*, in Genoa had the exclusive right of loading and unloading, but its workers went on strike and hindered the delivery of the plaintiff's goods. The plaintiff challenged the monopoly of *Merci* and the Court held that the monopoly was in breach of art.90 and the grant was

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(1995) *Industrial Law Journal* p.61.) See furthermore: Strozzi, Girolamo: *Gli aiuti di stato* (2000) in: Strozzi (ed): *Diritto dell'Unione Europea* pp.329-330.

<sup>26</sup> *Hoefner and Elser v Macrotron GmbH* (Case C-41/90) [1991] ECR I-1979.

<sup>27</sup> *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* (Case C-179/90) [1991] ECR I-5889.

<sup>28</sup> Interestingly, the Court treated public employment services as if they functioned as a business activity and this perception largely influenced the judgement. (Simitis, Spiros: *Europeizzazione o rinazionalizzazione del diritto del lavoro?* (1994) *Giornale di diritto del lavoro e delle relazioni industriali*, No.64, p.645.) In another case where the provider of social assistance was in a monopoly situation, however, the Court rejected the previous definition, and held that these activities do not constitute businesses in the sense of art.85 and 86 of the EEC Treaty, their character is exclusively social, and they are non-profit. (*Poucet et Pistre, Joined Cases 159 and 160/91*; judgement of 17.02.1993, points.18, 19.) Roccella comments that the self-restraint of the Court in the latter case could be attributed to the very delicate nature of the problem, as a judgement similar to *Macrotron* would have led to unpredictable consequences in national social protection systems. He also notes that it was probably not the intention of the founding fathers of the Community, committed to enhance liberal principles, that the regulation of public employment services would enter under the heading of competition between undertakings. (Roccella, Massimo: *La Corte di giustizia e il diritto del lavoro* (1997) pp.116-118.)



"liable to create a situation in which the undertaking is induced to commit abuses."<sup>29</sup> The Court made no explicit reference to the social issues involved, and at the heart of the problem, as in the Macrotron case, there was another issue: although public ownership was never seen as inconsistent with the Treaty, it was nevertheless seen as a protected segment of the market, and the Commission has above all pursued a vigorous policy of liberalisation in the name of market integration.<sup>30</sup> This issue obviously outweighed any social consideration.

Summarising this short illustration, it is useful to recall the words of a distinguished scholar: "In these judicial trends on the law of market competition, labour power is not adequately distinguished by the Court's judges from commodities. Competition law creeps forward, therefore, to occupy territory which labour law or 'social law' is supposed to safeguard."<sup>31</sup> Another expert comments in more concrete terms: "Competition in the EC is more and more based on labour costs. [...] Here is European labour law: competition law imposes the reduction of labour costs. The initial concept on upward harmonisation is abandoned."<sup>32</sup> To continue the same line of reasoning: "If it is anchored only in the assumption of completing the internal market, labour law would be constrained to a real genetic mutation: instead of aiming to balance the position of the parties through labour contract and support trade union actions it should be oriented towards the regulation of competition. This situation would not exclude -in fact it might paradoxically favour- the creation of workers' rights, but across a dangerous overturning of downwards orientation."<sup>33</sup> Though the Court did not include labour law issues in its judgements, labour lawyers can further develop the line of reasoning by raising the question of what would have happened if the Court had decided to find a balance between

<sup>29</sup> Meliado comments that "the constitution of exclusive rights facilitates the abuse of dominant position." (Meliado, Giuseppe: *Concorrenza e politiche sociali* (1996) in: Baylos Grau, A.; Caruso, B.; D'Antona, M.; Sciarra, S. (eds): *Dizionario di Diritto del Lavoro Comunitario*, p.285.)

<sup>30</sup> Davies, Paul: *Market Integration and Social Policy in the Court of Justice* (1995) *Industrial Law Journal* p.69.

<sup>31</sup> Wedderburn: *Labour Law and Freedom; Further Essays in Labour Law* (1995) p.379.

<sup>32</sup> Lyon-Caen, Gérard: *L'infiltration du Droit du travail par le Droit de la concurrence* (1992) *Droit Ouvrier* p.319.

<sup>33</sup> Sciarra, Silvana: *Uno "strabismo del Venere": Le politiche sociali comunitarie verso il completamento del mercato interno* (1991) 22 *Prospettiva Sindacale* p. 37. For similar comments see: Roccella, Massimo: *Lavoro e mercato nella giurisprudenza della Corte di Giustizia* (1999) *Giornale di Diritto del Lavoro e di Relazioni Industriali*, p.61.

labour law and competition values. No immediate conclusion can be reached, because labour lawyers face difficulties in finding the exact legal basis on which to found their arguments. The Treaty articles of a programmatic nature or the non-binding Community Charter are hardly sufficient to challenge the arguments of competition lawyers. In the present situation there is no clear guidance which could win in the confrontation with competition rules.

### Objectives of Community social policy

So far we have examined, although briefly, the role of labour standards from the viewpoint of economists, and the position of labour law versus values promoted by competition in the context of Community law. As a next step the answers provided for by the Commission have to be explored. As the documents examined show, although the Commission recognised the role and the importance of labour standards, in the search for solutions, a completely different line of reasoning was adopted. Four documents were chosen to illustrate the Commission's position, of which two, the Ciampi reports<sup>34</sup> and the White Paper on Growth, Competitiveness and Employment<sup>35</sup> were devoted to clarifying the values driving the Community's development in general, whereas the Social Policy White Paper<sup>36</sup> and the Essen Conclusions<sup>37</sup> were limited to social and labour market issues.

A commonly held opinion of these documents was that the search for a more competitive Europe through trade and other policies does not imply that social protection should be undermined in Europe.<sup>38</sup> The importance of labour standards essentially rests on

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<sup>34</sup> The Competitiveness Advisory Group (CAG) was set up at the end of 1995 in pursuance of a recommendation of the Essen European Council. After the Chairman of the CAG, Carlo Azelio Ciampi, the reports prepared by the Group were named the Ciampi Reports. The Group's mandate was to produce six-monthly reports and give advice on how to enhance the competitive capacity of the Union. The members of the Group had executive responsibilities in leading European companies or institutions and the pragmatic approach to tackle the problems conferred a specific importance on their work.

<sup>35</sup> Equally called as the 2nd White Paper; EC Publication, COM-82-94-529-EN-C

<sup>36</sup> European Social Policy; A way forward for the Union COM(94)333; 27.07.1994. (also known as the Social Policy White Paper)

<sup>37</sup> The Essen European Council took place in December 1994

<sup>38</sup> White Paper on Growth, Competitiveness and Employment (1994) p.127.

their role as an *input* into economic development and the maintenance of the dynamic competitiveness of economic systems. The two factors, labour standards and competitiveness, have a mutual influence on each other; competitiveness should be seen as a basic means to raise standards of living, provide jobs for the unemployed and eradicate poverty.<sup>39</sup> It remains to be seen what kind of solutions are proposed to enhance this mutual dependence, so that both sets of values contribute to European integration.

In 1995 the Ciampi Report argued that in order to exploit new economic opportunities Europe has to become a great deal more flexible to be able to adjust to the rapidly changing economic environment. For this, the completion of the internal market has an absolute priority. The Report also argued for the following: Market forces have to enjoy greater autonomy, but there is no single model of deregulation and privatisation to be applied throughout Europe. Investments in infrastructure, the promotion of small and medium size enterprises and investment in human resources play a central role. The creation of a more flexible environment must not mean destructive deregulation. The social impact of all measures has to be taken into account and where specific protection is needed it has to be provided for. Particular attention has to be devoted to enhance the adaptability of workforces, which can be stimulated primarily through access to training. Basic education is only one component in the development of human resources, learning should be seen as a continuing process throughout an individual's life. Occupational structures are changing so rapidly that they demand more career flexibility, adjustment and transformation of job content in existing occupations or mobility between occupations.<sup>40</sup>

The White Paper on Growth, Competitiveness and Employment highlighted similar key policies necessary to achieve economic growth and to promote social standards: The creation of a favourable macroeconomic framework supporting market forces instead of constraining them; increasing competitiveness by removing regulatory rigidities; and to switch from passive employment policies to active ones. There can be no

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<sup>39</sup> Second Ciampi Report (1995) p.7.

<sup>40</sup> Second Ciampi Report (1995) particularly: pp.7-9. and 21-23.

doubt that education and training, in addition to their fundamental task of promoting the development of the individual, have a key role to play in stimulating growth and restoring competitiveness and a socially acceptable level of employment in the Community.<sup>41</sup>

The White Paper on Growth, Competitiveness and Employment was followed by other Commission documents concentrating more specifically on social issues. First the Commission launched a wide debate on the social dimension of the Union in the form of a Green Paper<sup>42</sup> which was then followed by more concrete proposals in the form of a Social Policy White Paper,<sup>43</sup> representing the outcome of both the social policy and the economic policy debate.<sup>44</sup> The key resource will be a well-trained, highly motivated and adaptable working population. Investments in qualifications and skills of the present and future workforce is as indispensable as investment in real capital. While wealth creation is essential for social progress, the social environment is also an essential factor in determining economic growth. Progress cannot be founded simply on the basis of the competitiveness of economies, but also on the efficiency of European society as a whole. Equally, the pursuit of high social standards should not be seen only as a cost but also as a key element in the competitive formula. It is for these essential reasons that the Union's social policy cannot play second string to economic development or to the functioning of the internal market.<sup>45</sup> These conclusions, and the other Commission documents argue in the same direction, mean a fundamental turning point in the perception of social objectives.

A further step has to be taken in order to implement the principles so far elaborated. In this respect the Social Policy White Paper gives some indication and the reasoning follows that of the Ciampi Reports. The Social Policy White Paper underlines that the Union has to tackle European unemployment as part of a broader economic

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<sup>41</sup> 2nd White Paper (1995) pp.61; 133-34.

<sup>42</sup> Green Paper, European Social Policy Options for the Union COM(93)551; 17.11.1993.

<sup>43</sup> European Social Policy; A way forward for the Union COM(94)333

<sup>44</sup> Freedland, Mark: *Employment Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* p.298.

<sup>45</sup> COM(94)333; 27.07.1994; pp. 10-12. and 23.

strategy. The diversity of European societies has to be widely respected. This recognition means that total harmonisation of social policies is not an objective of the Union. However, the convergence of goals and policies over a period of time, through fixing common objectives, is vital since it will permit the co-existence of different national systems and enable them to progress towards the fundamental objectives of the Union. The establishment of minimum standards is necessary but they should not overstretch the economically weaker Member States, and they should not prevent the more developed Member States from imposing higher standards. The establishment of a framework of basic minimum standards provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness, and is also an expression of the political will to maintain the momentum of social progress.<sup>46</sup>

The Union's priorities with regard to the future development of social policy have crystallised, and they should be underlined once more: access to training, a shift from passive to active labour market policies, and common objectives to promote the convergence of goals and policies of the different national systems. The core issue is employment, embedded in a broader economic strategy. Although the need for labour standards is recognised, there is no proposal to enact them. More precisely, there is no proposal for any kind of legislation. The White Paper on Social Policy states this clearly: "Given the solid base of European social legislation that has already been achieved, the Commission considers that there is no need for a wide-ranging programme of new legislative proposals in the coming period."<sup>47</sup> All that remains are policy aims which do not exclude recourse to binding legislation, but the Commission has chosen an alternative mode of implementation.<sup>48</sup>

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<sup>46</sup> COM(94)333; 27.07.1994; p.12.

<sup>47</sup> COM(94)333; 27.07.1994. p.13.

<sup>48</sup> Kuper, reviewing the Green and White Papers, criticizes the Commission as follows: "Owing to the non-binding nature of this recommendation policy, European control bodies scarcely have an opportunity to exert any real political influence." (Kuper, Bernd-Otto: *The Green and White Papers of the European Union: The Apparent Goal of Reduced Social Benefits* (1994) 4 *Journal of European Social Policy* p.136.)

The method followed was to benchmark Community policies and then leave the actual elaboration and implementation to Member States, based on national choices. The foundation of the process was provided by the Essen European Council in December 1994.<sup>49</sup> The European Council meetings have proved to be an optimal framework for policy developments.<sup>50</sup> During the implementation period, the Commission is in a crucial position: it has a considerable capacity to steer the debate, to advance new ideas and measures, and to control their implementation, thus guiding the process from the beginning to the end.<sup>51</sup>

The Essen Conclusions contained five key recommendations to improve the employment situation:

1. Increasing job opportunities by promoting investment in vocational training. Under this heading particular importance was attached to training, further training and, lifelong learning.
2. Making growth more 'employment-intensive'. Local projects were promoted, to search for new employment pools. The reason for this was that at local level the needs can be better satisfied by new services and these programmes are rarely incompatible with competition rules. The promotion of labour market flexibility was also proposed by having recourse to atypical work contracts, particularly to new forms of employment, such as job rotation.
3. Reducing indirect labour costs to make labour cheaper and to promote investments. This point was more relevant in the context of economic and fiscal considerations than of labour law, narrowly defined, although it has important repercussions for labour market policies.
4. Switch from passive to active employment policy. In short, the main advantage of active measures, although they impose budgetary burdens at least as much as the passive ones, is that they keep potential workers close to the labour market, enabling

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<sup>49</sup> The elaboration of the action plan was already anticipated in the Social Policy White Paper (COM(94)333. p.21.).

<sup>50</sup> Goetschy, Janine: *The European Employment Strategy: Genesis and Development* (1999) 5 European Journal of Industrial Relations p.120.

<sup>51</sup> Leibfried, Stephan and Pierson, Paul: *European Social Policy. Between Fragmentation and Integration* (1995) pp.435-437.

them to have access to training facilities and various forms of short-term employment (such as apprenticeship, socially useful work, employment through subsidies).

5. This initiative has a specifically European nature. It contains action based on the principle of solidarity to develop special measures for those groups which are particularly affected by unemployment, i.e. young people, long-term unemployed, women and older workers.<sup>52</sup>

The Essen Conclusions provided a comprehensive set of priorities to be applied in labour market and employment policies. However, there are a number of additional factors which weakened the likelihood of meaningful Community intervention to promote social policies in a unifying manner. Although from the foundation of the Community there have been numerous advocates of the automatic harmonisation of social standards between the Member States, such harmonisation is yet to occur. Instead diversification between national systems has intensified. The initial idea of harmonisation was followed by the process in which the key words were 'mutual recognition' and 'convergence of national systems'.<sup>53</sup> In this context, which is characterised by the absence of binding rules and firm principles, the principle of subsidiarity plays a predominant role.<sup>54</sup>

The codification of the principle of subsidiarity in the Maastricht Treaty (art.3/b) further promoted national diversity. The Conclusions of the Edinburgh European Council,

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<sup>52</sup> The principle of solidarity has a decisive role in European construction. The White Paper on Growth, Competitiveness and Employment set out as the main objective of the Union: the creation of an economy that is healthy, open, decentralised, competitive and based on solidarity. Solidarity between regions, between those who have a job and those who do not, between men and women, between generations and against social exclusion. (2nd White Paper (1994) pp.11; 15.)

<sup>53</sup> The principle of mutual recognition was based on the perception that a product manufactured in one Member State in accordance with its legal order should be recognised and be subject to the free movement of goods without limitation in another Member State, instead of creating a supranational system of product and trade standards. The Court of Justice largely contributed to the generalisation of the principle by its judgement in the case of Cassis de Dijon. However, this same principle in the field of labour standards can promote deregulation and downwards adaptation, as it accepts low labour standards notwithstanding the continuous efforts to give art.117 more practical effect and to avoid or limit social dumping. (see e.g. Sciarra, Silvana: *Il dialogo fra ordinamento comunitario e nazionale del lavoro: la contrattazione collettiva* (1992) *Giornale di diritto del lavoro e di relazioni industriali* p.719; Roccella, Massimo and Treu, Tiziano: *Diritto del Lavoro della Comunità Europea* (1995) p.27; Streeck, Wolfgang and Schmitter, Philippe C.: *From National Corporatism to Transnational Pluralism: Organised Interests in the Single European Market* (1992) *Politics and Society* p.142;)

<sup>54</sup> Sciarra, Silvana: *Uno "strabismo di Venere": Le politiche sociali comunitarie verso il completamento del mercato interno* (1991) 22 *Prospettiva Sindacale* p.34.

(December, 1992) explained in detail the content of the principle: the core of the principle is, that the Community should act only within the limits of the powers conferred on it and only if the objectives could be better achieved at Community level. Furthermore, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards and the Community should legislate only to the extent necessary. All things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct.<sup>55</sup>

Beyond the wide academic literature devoted to this principle,<sup>56</sup> the considerations laid down in Maastricht are not completely unknown in the social context.<sup>57</sup> The concept of minimum requirements was introduced in art.118/a of the Single European Act, then upheld in art.2 of the Social Chapter. Reliance on the principle of subsidiarity is well known from the 1989 Community Charter, which referred to both the functional and legal application of the principle. However, the prospects of further reliance on the principle of subsidiarity is little encouraging. We have seen how frail the edifice of social law is and how precarious the political equilibrium among Member States may become, when it comes to producing social norms. The principle of subsidiarity, which seems to co-exist with the notion of decentralised economies, does not automatically give rise to minimum standards in the social field; its positive effects still have to be demonstrated against the

<sup>55</sup> Bulletin of the EC; 12/1992 pp.12-18.

<sup>56</sup> De Búrca comments on the principle of subsidiarity as follows: "Yet despite its undoubted importance, subsidiarity is, as the abundant literature on the subject amply demonstrates, a cloudy and ambiguous concept which is readily open to instrumental use. The principle is politically complex and legally uncertain." (De Búrca, Gráinne: *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor* (1998) 36 *Journal of Common Market Studies* p.218.) De Witte argues that the principle of subsidiarity is a rather elusive notion and its interpretation according to the criterion of necessity and at times to that of efficiency opens up discussions of an economic and political nature. (De Witte, Bruno: *Community Law and National Constitutional Values* (1991) *Legal Issues of European Integration*, No.2. p.20.) It is interesting to point to Streeck's view that the principle of subsidiarity was codified when monetary policies were already completely centralised at Union level. (Streeck, Wolfgang: *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva* (2000) *Stato e Mercato* No.58. p.10.) This differentiation would ultimately underline the economic orientation of the integration process.

<sup>57</sup> Simitis, Spiros: *Europeizzazione o rinazionalizzazione del diritto del lavoro?* (1994) *Giornale di diritto del lavoro e di relazioni industriali* No.64. p.649.



reluctance and the delays of governments to act.<sup>58</sup> Consequently the central question in the search for solutions is how labour market regulation can overcome its subordinated position which derives from the "dual subsidiarity"?<sup>59</sup>

There is one more issue to be clarified. Leibfried argues that of the four basic freedoms, 'freedom of movement' is the 'poor relation'.<sup>60</sup> Whereas in the case of the 3 other freedoms a common, then single, market was created, this was not the case for labour, where 'only' free trade was established in 1957 and the different national employment regimes have remained to a large extent isolated from one another. There are no institutions which could characterise the common labour market. The most important indicator of such a common labour market would have been the right of mobility. Up to the Maastricht Treaty (art.8/a) this right was limited to the category of workers or to self-employed persons, and not granted to citizens; this right is still restricted, notwithstanding the generous inclusion of family members, students and pensioners. Another possible indicator which is still lacking is a unified definition of the European labour market, clearly distinguished from third countries by common regulations. There is no single immigration policy but a net of bilateral agreements between national governments and third countries. European employees have no protected position *vis-a-vis* third country employees, or even clandestine immigrants.<sup>61</sup> Consequently the efforts to establish a unified European labour market policy lead to only symbolic results. National regimes are predominant and the efforts made at Community level to reduce unemployment and poverty or to promote active labour market policies have remained marginal.

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<sup>58</sup> Sciarra, Silvana: *Social Values and the Multiple Sources of European Social Law* (1995) 1 European Law Journal p.76.

<sup>59</sup> Dehousse, Renaud: *Integration v. Regulation? Social Regulation in the European Community* (1992) p.7. In his article the author uses the expression as follows: dual subsidiarity of social regulation in the structure of the Treaty of Rome includes subsidiarity with respect to the Community's main *raison d'être*, namely market integration, and subsidiarity with respect to national regulatory policies.

<sup>60</sup> Leibfried, Stephan: *The social dimension of the European Union: en route to positively joint sovereignty?* (1994) Journal of European Social Policy pp.242-244.

<sup>61</sup> Some Member States are strongly interested in acquiring a labour force from third countries, thus they try to use all possible means to impede the creation of a common migration policy, or to give priority to Community workers. The situation is brilliantly illustrated by a French comic, Coluche: "ah, ces portugais qui viennent bouffer le pain de nos arabes!" (Mancini, Federico G.: *Politica comunitaria e nazionale delle migrazioni nella prospettiva dell'Europa sociale* (1989) 29 Rivista di Diritto Europeo p.312.

The results of this implementation gap are manifested in the form of 20 million unemployed and 50 million people in poverty in the EU. Such figures illustrate an impetus for a social dimension to European integration.<sup>62</sup> The problem of unemployment has gradually come on the scene since the beginning of the 1980s, whereas the importance of poverty has become recognised only in recent years. Both the Member States and the Commission have realised how serious the problem is, and have given the green light to programmes for a more inclusive society, policies against poverty and social exclusion.<sup>63</sup>

At the beginning of the thesis I argued that the conflict between workers and employers could not directly influence Community legislation in the field of labour law since the logic followed was market integration and free competition. Social pressure to enact labour legislation and social policies remained at a national level. However, economic growth is not necessarily translated into a growth in employment. It may offer no immediate solution to the problem of social exclusion.<sup>64</sup> The social power of the unemployed and of those frightened by social exclusion has urged to place more emphasis on labour market policies.

What was necessary seemed to coincide with what was possible. The organic development of social policies since the foundation of the Community, as emphasised above, only opened up space for market, employment related interventions. The role of these interventions was then fundamentally revaluated during the integration process: labour market policies were more clearly defined, and focused more on the *input* side, so that the social environment came to be recognised as an essential factor determining economic growth.

<sup>62</sup> Leibfried, Stephan: *The social dimension of the European integration: En route to positively joint sovereignty?* (1994) *Journal of European Social Policy* p.244.

<sup>63</sup> Negri, Nicola and Saraceno, Chiara: *Povert , disoccupazione ed esclusione sociale* (2000) *Stato e Mercato* No.59. p.175. The concept of social exclusion was first recognised in a Council resolution adopted in 1989 (OJ C 277; 31.10.1989.) Social exclusion arises directly from poverty and marginalisation caused by a variety of factors including: long-term unemployment, the impact of industrial change on poorly skilled workers, the breakdown of family structures and declining level of social security. (Kenner, Jeff: *European Social Policy -New Directions* (1994) *IJCLLR* p.58.)

<sup>64</sup> Deakin, Simon: *Labour Law as Market Regulation: the Economic Foundation of European Social Policy* (1996) in: Davies, P; Lyon-Caen, A; Sciarra, S; Simitis, S. (eds): *European Community Labour Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton p.88.

A competitive labour force does not only contribute to European social policies, which, of course, is in itself indispensable. A more skilled workforce in the European labour market promotes its own position by gaining access to work with better conditions and higher remuneration. In the global context, enhanced employability is the only way to be protected from direct competition with workers whose labour costs so much less. There is no legal or moral norm which can prohibit an entrepreneur making use of cheaper labour force or moving his production to a country with lower labour standards and costs, whether in Asia, South America or Eastern Europe. In other words, a no-skilled or poorly skilled worker has a major chance of finding employment in a sector subject to social dumping, whereas a highly skilled and adaptable worker is less restricted, and can compete both in the local and in the global context.<sup>65</sup> Thus a highly skilled, adaptable workforce is object of not so much of social policy, but, again, and ultimately, that of competitiveness.

Regarding the other burning question of the post-Maastricht era, of Community labour standards, the Community documents do not provide a promising answer. We find only wishful thinking. As discussed a uniform level of labour standards throughout the Community cannot be created since it would be politically unacceptable for some Member States and economically harmful for others, as it would lead to loose comparative advantages. However, a Community catalogue of rights related to the world of work is still indispensable to grant workers greater protection in a common labour market. This is so, even if harmonisation of national systems is neither requested nor desired and instead convergence and co-ordination is pursued. A Community catalogue of social rights would serve as a reference point when national policies are benchmarked.<sup>66</sup>

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<sup>65</sup> Adnett, Nick: *Social Dumping and European Economic Integration* (1995) 5 *Journal of European Social Policy* p.11.

<sup>66</sup> Procedures can only function at their best, when they rest on a solid ground of positive norms. (Sciarra, Silvana: *From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy* (1999) in: Alston, Philip (ed): *The EU and Human Rights* p.486.) See e.g.: Blanpain, Roger; Hepple, Bob; Sciarra, Silvana; Weiss, Manfred: *Fundamental Social Rights: Proposal for the Union* (1995) See too: Hepple, Bob: *The Future of Labour Law* (1995) 24 *Industrial Law Journal* p.321.

This catalogue already exists, it would be enough to include it in the text of the Treaty and grant it binding force.<sup>67</sup>

In light of these considerations we can say that numerous policy measures are available to promote Community action for the benefit of labour market actors. But these measures are only piecemeal. These provisions do not guarantee individual rights, nor do they oblige Member States to ensure access to training facilities to every young unemployed person or to subsidise those who are deterred through social marginalisation. What they can do is to give a better chance of reintegration into the world of work by a limited redistribution of the benefits of the single market. At present, most of this limited redistribution takes place through the Structural Funds. A further step would be the enlargement of this channel: forcing Member States to elaborate and implement a comprehensive set of labour market policies.

The impact of policy: A/ Shift from passive to active labour market policies

"New" labour market policies are characterised by the shift from the protective, benefit-oriented, passive labour market policies to the preventive, participation-based ones. Notwithstanding repeated encouragement on the part of Commission and national officials, statistical data shows that until recently, there was only a small move towards active policies. For example in 1997, public spending on labour market measures accounted for over 3% of the Union's GDP. Of this, some of 65% went to paying unemployment compensation and just 35% to active measures to increase employability and to assist in finding a job. The rate of expenditure on active measures was slightly higher than it was in 1994 (33-67%) but lower than it had been in 1990 (37-63%). True, in 1990 the unemployment rate in the EC was 7.5%, whereas in 1997 it was 10.5%.<sup>68</sup>

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<sup>67</sup> Yet practical possibilities have to be born in mind: it remains to be seen whether the inadequacy of the EC legal structure is really the underlying cause of the relative lack of progress to date or whether the diverse historical, legal and cultural industrial relations backgrounds of the Member States will impede the future development of social policy law. (Szyszczak, Erika: *First Report on the Community Charter of the Fundamental Social Rights of Workers* (1992) 21 *Industrial Law Journal* p.152.)

<sup>68</sup> Employment in Europe 1998 (on the basis of COM(98)666 final) p.130.

Some attention must be devoted to the problem of how the proposals elaborated by scholars, researchers and officials can be converted into practice. We will see that the recommendations have to be measured against a variety of interests and priorities before they can become functioning policies. In order to better understand these interests and priorities reference was made to some OECD documents on this issue.<sup>69</sup> The biggest advantage of these documents is that they put economic before political interests, and are not burdened by a certain enthusiastic-populist approach often recognisable in Commission documents, which makes it difficult at times to identify the real substance. The relevant OECD documents focus on two basic factors serving as points of departure: The first is that only economic growth can create employment. Stable, non-inflationary growth has to go together with active employment policy measures which help to create a highly skilled and flexible workforce, which is indispensable for efficient economic performance. It is not at all surprising that an economic organisation represents such a view. What is more surprising, is the second foundation: For the implementation of all reforms and policies, an enormous effort of explanation and leadership is needed. To improve labour market flexibility and to enhance adaptation to the rapidly changing market conditions, governments often have to face policy dilemmas. Finding a mix of structural policies that prevent the social costs of labour market reforms falling unduly on some sections of the workforce will be a challenge for policy makers.<sup>70</sup> The reduction in the generosity of social protection and the promotion of incentives to work might lead to social unrest and protest. Although the benefits of this 'creative destruction' far exceed its costs at the end, in a short run they might appear just the opposite.

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<sup>69</sup> The synthesis is based on the following reports: *Pushing Ahead with Strategy*, 1996; and *Lessons from Member Countries' Experience*, 1997.

<sup>70</sup> There is a big difference between the Anglo-Saxon and the continental European countries concerning labour market reforms. This difference is based on the fact that reforms introduced in countries belonging to the first group affect a large share of the working age population, whereas in countries belonging to the second group the effects of the reforms are focused on marginalised groups of the labour market and have very little impact on core groups. The OECD analysts note that some continental European countries are reluctant to risk social peace and see it as a more fundamental goal than low unemployment. By contrast, some, mainly Anglo-Saxon, countries insist that low unemployment is an essential condition for, or an element of horizontal equity. Exposing wider segments of the population to structural reforms might be perceived as more fair, since they reduce strains on social cohesion especially if the reforms are implemented with the consensus of the social partners. The OECD reports mention Ireland and the Netherlands as pioneers of the adaptation to the changing requirements and conditions.

In analysing active employment measures, it is necessary to distinguish whether certain measures can help to improve job prospects immediately, such as the reforms of the tax-benefit systems or mutually reinforcing macro-economic and structural policies. Other measures, such as promoting entrepreneurship, innovation and technology, lifelong learning show their effects on a longer timescale. Although active measures are generally favoured instead of passive ones, experience shows that not every single measure turns out to be efficient in terms of employment creation, thus caution and good targeting are required.

- *Job-search assistance*, such as job clubs, in-depth counselling targeted at appropriate individuals are usually the least costly interventions, and evaluation shows consistently positive outcomes in terms of re-integration.
- Subsidised *self-employment* in the form of financial and technical aid for business start-ups has proved to be successful in many countries, although only for a relatively small group of the unemployed. Programmes to foster entrepreneurship and small businesses should be an integral part of local development strategies because geographically targeted, area-based policies appear to have been more effective than sectoral ones. Frequently mentioned difficulties are the complicated administrative and legal requirements the self-employed have to fulfil. Therefore simplification in this area is required.
- *Training* is probably the most frequently applied active measure, but a number of assessments show low returns in terms of effectiveness. Programmes specifically targeted at the needs of the employer, at the persons involved and at the specific local conditions may bring about improvements.
- Although *employment subsidies* raise some doubts concerning their efficiency, since in the short run they tend to have displacement and substitution effects, and achieve small net employment gains, they may yield long run benefits by helping the unemployed to gain work experience and by maintaining their skills and work motivation. If carefully applied, such subsidies can equally contribute to the re-employment of those long-term unemployed who have no or low skills. Generally speaking, the main obstacle to the recruitment of these persons is that the costs of their employment are expected to

exceed their productivity. In such a situation an employer might easily choose to have recourse to labour supply from the black market.<sup>71</sup>

- Last but not least, *direct job creation* in the public sector has been of little success in helping unemployed people get permanent jobs in the open labour market. While temporary employment programmes can be used as a test run, and as means of helping the unemployed to maintain contact with the labour market, indiscriminate use of, and easy access to, such programmes may reduce the effectiveness of job search.

More efficient performance of active measures can be achieved by better co-ordination with unemployment compensation schemes. A close interaction has been found between active and passive measures. If the unemployment benefit system is too generous and poorly managed, it is very difficult to operate active measures so as to increase labour market efficiency and to reduce structural unemployment. To keep the unemployed as close as possible to the labour market requires a very active involvement on the part of labour market authorities. Public Employment Services have a key role in the implementation of both active and passive measures. A large number of active measures are organised through Public Employment Services and they are in a central position to transform passive income support schemes to active labour market measures. For example, those who are threatened with long-term unemployment should be provided with guidance, counselling and job assistance. Income support has to be made conditional on agreeing to participate in various labour market policy programmes after a certain period of unemployment. Labour market authorities should avoid the creation of programmes which do not correspond to real market needs and the establishment of new benefit entitlements. Obviously the fulfilment of these conditions largely depends not only on the attitude of the unemployed, but equally on the efficiency of public employment services. In this regard their transformation into a service which is more active, up-to-date, better

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<sup>71</sup> The problem leads to a very complex and delicate issue: the reform of tax and benefit systems. Apart from the clear need that low-wage work should not be over-taxed and the cost of hiring low-paid workers should be reduced, the policies which may increase the employment opportunities for the most disadvantaged may reduce work incentives for the majority. Various possibilities exist to cut tax rates for low wage workers, but they generally involve raising tax rates for workers elsewhere in the earning distribution. Meanwhile a Directive was approved on the possibility of applying a reduced VAT rate to labour-intensive services on an experimental basis. (Directive 1999/85 OJ L 277/34)

informed, and one which reacts quickly to the ever-changing market situation, is essential.<sup>72</sup>

B/ Local initiatives. A particular interaction between Community guidance and local diversity

The outstanding role of local initiatives in creating new jobs has emerged significantly since the publication of the 2nd White Paper.<sup>73</sup> The Commission identified 17 fields with potential for meeting the new needs and offering substantial employment prospects: home-help services, child care, new information and communication technologies, assistance to young people facing difficulties, better housing, security, local public transport services, revitalisation of urban public areas, local shops, tourism, audio-visual services, cultural heritage, local cultural development, waste management, water services, protection and conservation of natural areas, and the control of pollution.<sup>74</sup> The main arguments underlying the promotion of local initiatives are, first, that they are best placed to create jobs geared to these needs, and to take account of the diversity of cultural, legal and socio-economic organisation. Secondly, these initiatives apart from remedying market imperfections and fulfilling specific demands, do not harm international competition, but they might open up new opportunities.

However, experience shows that the implementation of such projects has proven to be rather complicated. Most of these initiatives are innovative in their very idea and organisation, and they do not fit easily into the existing legal, financial and institutional framework. The organisations established as a response to specific needs are mainly

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<sup>72</sup> The Commission also recognised the necessity to reform Public Employment Services. See: Modernising Public Employment Services to Support the European Employment Strategy (COM (98)641; 13.11.1998.)

<sup>73</sup> The interest in local initiatives to mop up the pockets of unemployment which are likely to be insufficiently covered by macro-economic and structural policies dates back to the early 1980s when the OECD and the Commission decided to set up the first local employment initiative (LEI) programmes. Initially, the work focused on understanding the realities of the phenomenon which was at that time largely unexplored. Then since the middle of the 1980s the Commission has launched programmes to promote local employment creation and to analyse and identify good practice. (see Commission document EN/05/97/67460000.W00(FR))

<sup>74</sup> White Paper on Growth, Competitiveness and Employment (1993) p.19. Since then two other fields have been added to the list: sport and energy-saving (First report on local development and employment initiatives; Lessons for territorial and local employment pacts - a Commission publication, (1996) pp.32-39.)



private, but non-profit oriented. Most of these structures operate on small scale, but they often have a large number of non-active associates and unpaid volunteers. They are built on the principle of social solidarity, they promote co-operation instead of competition and the private-public dichotomy is replaced by partnership.<sup>75</sup> Such features clearly show that the problem of inserting these new entities into the existing legal, administrative and financial framework goes much further than can be resolved on local level.

What is needed is a cautious Community level guidance, sensitive to national, at times regional and local diversity, but still capable of integrating, co-ordinating, and to a certain extent, structuring and influencing the development process. In an earlier document, the Commission made an attempt to identify the main obstacles hampering the implementation and growth of local initiatives, and it also outlined the main tasks the Community has to perform.<sup>76</sup> One task is the financial contribution towards experiments and innovations. This can happen mainly through the Structural Funds. Another main task is the dissemination and promotion of best practice. The exchange of information and co-operation is the only way to gain data, to evaluate and monitor, since each of the projects is implemented according to very specific conditions and requirements and the special nature of each project would be lost if mere statistical data-transfer would be used.<sup>77</sup>

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<sup>75</sup> Local employment development. Experience and growth potential of Local Development and Employment Initiatives (LDEI) EN/05/97/67460000.W00(FR) These new structures operate in the so-called "social economy". Its definition remains very vague in Europe, because it covers differing legal and economic national realities, such as co-operatives, mutual societies, associations and foundations. Concerning the approach applied by the LDEIs, two criteria should be borne in mind: the absence of any profit-making aim and the combination of private and public resources. (First report on local development and employment initiatives; Lessons for territorial and local employment pacts -a Commission publication, (1996) p.10.) These initiatives are also known as the "Third System of Employment" referring to the social economy content, separating it from the traditional forms of private or public employment. See e.g.: Local development and employment initiatives -a working document of the Commission (SEC(95)564; March 1995) or Call for proposals for implementation of the "Third system and employment" pilot schemes (OJ C 196; 26.06.1997).

<sup>76</sup> Communication from the Commission to the Council and the European Parliament; A European strategy for encouraging local development and employment initiatives (COM(95)273 final)

<sup>77</sup> To give an example: The Commission set up the LEDA (Local Employment Development Action) Programme in 1986. This came to a conclusion in 1996 with strong aim of capitalising on the results. With the help of 10 years' experience, it was possible to formulate a number of concepts and working methods. These make it easier to ascertain the differences in terms of human and organisational capacities which explain why areas which would appear at first sight to enjoy more or less similar development conditions nonetheless produce very different results in job creation. (Final report on the LEDA programme for DG V, and Local Development: the lessons learnt from 10 years of experience of the LEDA programme and prospects for the future; 1996)

An example should be given of how to build up Community-wide proposals putting together the bricks of valuable local experience. The case study referred to here can illustrate the interaction between local initiatives and the articulation of Community guidelines. It also adds one more element to the complexity in the shift from passive to active employment policies. An important obstacle hampering the opening up of new job opportunities found by the Commission is the inefficient performance of public placement services. An initial proposal by the Commission concentrated on decentralisation, but the conclusion drawn from individual cases led to a more comprehensive proposal. The point of departure was that traditional public employment services proved unable to carry out services other than administration, checking eligibility criteria for entitlements and paying benefits. Thus the involvement of private organisations is required to make placement more efficient.

A Dutch employment agency, called Maatwerk, signed a contract with the city of Hamburg to place 300 people on social assistance in the regular labour market at a wage which exceeded the average social assistance allowance. The agency received a premium for the placements. The project was evaluated as successful, and later Maatwerk signed another contract to reduce the general unemployment rate of Hamburg. In brief, the secret of their success was that job counsellors used their own contact networks and those of their job seekers, or they tried to discover new job opportunities, for example they contacted the management of new shopping centres, leisure centres or factories under construction. In addition to the companies employing relatively high numbers of workers, another source of hidden vacancies was found at SMEs. Generally speaking, unemployed people are not attracted to SMEs because of lower pay, working conditions and career opportunities. Similarly, SMEs have a low opinion on unemployed people, mediated by the local public employment services. But when job seekers and SMEs were brought together, the right people for vacancies which, until then, had been hidden, could soon be identified.

This and other case studies led to a series of conclusions and then more general proposals were put forward by DG V officials:<sup>78</sup> The underlying idea was to make use of private employment agencies, which would be motivated by remuneration linked to successful placement, as in the above case. The commission obtained might reflect the wage level attained, the duration of employment, the degree of difficulty in finding the appropriate job for the applicant, taking into consideration personal characteristics or the local labour market situation. The system could be elaborated by the public employment services, and this would be their new role in the framework of the new partnership. The public organisation would survey the placement activities, carry out monitoring and evaluation, and manage the transfer of premia. An immediate and tangible financial advantage of the new system would be lower expenditure on employment subsidies, but higher income from tax and social security contributions.

The example brightly illustrates that although the point of departure was to satisfy a local need, if appropriate conditions were to be created, this would require fundamental changes in the existing national legislation. Such a process is very long and complicated. The interaction between local needs and Community guidance can yield results in the long run: the priorities spelled out at Community level and the guidelines, projects, financial contributions and, eventually, directives can push Member States to reform their financial, legal and institutional systems in the direction suggested by examples of best practice found elsewhere in the Union.

The notion of local initiatives is very complex, there are various aspects yet to be scrutinised. The principal argument in favour of local initiatives and employment pacts is that they have a major role to play in exploring those employment opportunities which neither the market nor the public authorities can do alone. The interaction between the Community and the local level to promote efficiency and to remove obstacles hampering micro-development is, as already explained, a far more complicated issue. In order to

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<sup>78</sup> The authors of the proposals and the underlying paper were: Armindo Silva and Ralf Jacob (see Policy and Perspective Group, 1997 September)

articulate guidelines and priorities and to capitalise knowledge, continuous dialogue between the parties, mutual adaptation and regularly updated feedback are essential.

A final remark concerns the importance of the local level in an era of globalisation. The traditional thinking has to be placed in a wider geographical context, as influential economic decisions are increasingly taken outside national boundaries or outside Europe, but the most adequate responses can still be found only locally, by bearing in mind the specific circumstances. As most market surveys on policy measures proves, the articulation on a purely macro-economic level by itself is unsatisfactory. The policy choices and implementation must be personally tailored; direct contact between the persons involved, in depth knowledge of the given circumstances is indispensable, and can only be performed locally.<sup>79</sup>

#### Labour market policies: from Essen to Amsterdam

The first follow-up document of the Essen European Council<sup>80</sup> urged the Member States to transpose the recommendations of Essen into national policies in the framework of multiannual programmes, having regard to the specific features of their economic and social situation. Although the recommendations were very vague and lacked binding force, they underlined the importance of a coherent and complex approach. The design of this approach would be assisted by the identification of the key characteristics of employment performance, the collection of data for monitoring purposes, and the exchange of information on best practices.

During the first half of 1996 when more political pressure was brought to bear on labour market issues, the Commission prepared a report under the title: "Action for employment in Europe: A confidence pact" which, to underline its importance was presented by the then President of the Commission, Jacques Santer. Probably the most

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<sup>79</sup> Sciarra, Silvana: *How 'Global' is Labour Law? The Perspective of Social Rights in the European Union* (1998) in: Wiltgen, T. (ed): *Advancing Theory in Labour Law and Industrial Relations in a Global Context* pp.102-103.

<sup>80</sup> Communication from the Commission to the Council; Follow-up to the Essen European Council on employment (COM(95)74 final)

important contribution of the report was the proposal to strengthen the monitoring procedure, to build a bridge between overall macro-economic co-ordination, labour market and unemployment prospects. The Employment Pact stressed that this monitoring procedure should be reinforced by Council and Commission recommendations and that this should be institutionalised at the Intergovernmental Conference of 1996.<sup>81</sup>

The Dublin European Council (December 1996), as did the previous one held in Florence (June 1996), pointed out that employment continues to be the first priority for the European Union and for the Member States. The Declaration of the European Council made clear that while the primary responsibility in the fight against unemployment rests within the Member States,<sup>82</sup> the Union must support to the fullest extent their efforts to promote employment and minimise unemployment. In this regard the contribution of the Community was reaffirmed by the European Council which concluded that it was essential for the Community to further develop and deepen the integrated employment strategy, by embracing macro-economic policies and policies of structural reforms as laid down in Essen.<sup>83</sup>

So far we have found two key institutions which then became the pillars of the Amsterdam provisions on employment: the monitoring process and the integrated employment strategy. Furthermore the division of competences has to be underlined: although the struggle against unemployment remains the responsibility of the Member States, the Community has to provide full support.

Two further documents need to be mentioned in order to highlight the factors which most attracted the attention of labour market specialists. Thus, we can reveal a more complete picture of the situation which led to calls for the enactment of new measures. The 1996 Employment in Europe Report<sup>84</sup> underlines that the Member States

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<sup>81</sup> Action for employment in Europe -A confidence pact (1996) Bulletin of the EU, Supplement 4/96. p.24.

<sup>82</sup> This affirmation of the Member States' competence is mentioned by Raffaele Foglia as a prerequisite to present and evaluate the relevant provisions of the Amsterdam Treaty. (Foglia, Raffaele: *La politica sociale dopo Amsterdam* (1998) Diritto delle relazioni industriali No.1. p. 27.)

<sup>83</sup> The Jobs Challenge -Dublin Declaration on Employment (1996) Bulletin of the EU No.12. p.30.

<sup>84</sup> Employment in Europe 1996 (COM(96)485)

have only a narrow margin to manoeuvre in the struggle against unemployment and marginalisation. The traditional demand-management through public deficits was changed in the pursuit of stability-oriented macro-economic policies. Although this latter policy stimulates job creation through economic growth, it does not yield immediate results, but causes difficulties through the reduction in and withdrawal of benefits which had previously been enjoyed.<sup>85</sup> It seems a rather impossible mission for any government to reduce public deficit and at the same time to invest in factors of long term growth, such as education or infrastructure, and to preserve the same level of taxation, or, better to reduce it.

The authors of the Employment in Europe Report emphasised that, besides the fundamental change in the macro-economic environment, the nature of work had also undergone radical transformation: increased use of night work, work during the week-ends had occurred, and the overwhelming majority of new jobs were atypical, part-time or temporary. Although there was a clear tendency for large enterprises to lose jobs, this loss was largely compensated by new jobs created in SMEs. The Report emphasises the crucial importance of flexibility<sup>86</sup> and adaptability in the continuously changing world of work. Similarly, a better chance can be given to the unemployed to re-enter the labour market through the intensification of training opportunities. Albeit budget consolidation has taken precedence over expenditure on restructuring, there was now some evidence that labour market policies were now being revised in favour of active measures.

<sup>85</sup> Fiscal and monetary tightening, to head off accelerating inflation, is designed to keep unemployment at its present rate or to push it higher. (Blanpain, Roger: *European Social Policies: One Bridge too Short* (1999) 20 IJCLIR p.499.)

<sup>86</sup> Labour market flexibility itself has a flexible definition, the scope of its meaning is rather imprecise. The most common usage measures flexibility by the speed and quantity of adjustment in a changing economic environment. The more flexible market has wages adjusting rapidly when unemployment or prices change; has employment or hours adjusting rapidly when labour demand changes; has greater mobility of labour between different sectors, firms and geographic areas as demands shift; has more rapid transitions from unemployment to employment and so on. But to highlight the flexible definition of flexibility we should remember that in a Japanese context, e.g. flexibility means adaptive corporate strategies, changeable production technologies, or a multiskilled and adaptable workforce. But the Japanese example in another situation can be referred as a typical rigidity by its feature of commitment to life-time employment contracts. (Blank, Rebecca M. and Freeman, Richard B.: *Evaluating the Connection Between Social Protection and Economic Flexibility* in: Blank, R. M. (ed): *Social Protection vs Economic Flexibility. Is There a Trade-off?* (1994) pp.25-26.)

The 1997 Employment in Europe<sup>87</sup> Report was drafted in light of the Amsterdam Treaty. It was a preparatory document for the Luxembourg Jobs Summit (November 1997) and the key points identified in this Report proved to be crucial for the newly published Employment Guidelines. It is of interest to recall some of the most significant observations on the structure of the European labour market. The two, probably most painful problems were long-term unemployment (more than half of the total unemployed) and unemployment of young people (around 20% of the total unemployed). The Report adds that in Europe above those who are recorded as unemployed there is still a labour reserve which can be mobilised to increase the participation rate which is well under the American and Japanese levels (in 1996 the European employment rate was just above 60%, whereas Japan had a rate of 74%, and the US a rate of 73%). Following the quantitative survey the Report examines the qualitative structure of the labour market and summarises that, as in former years, the proportion of part-time and other atypical jobs has increased, a fact which places the spotlight on the crucial importance of job security, the protection of workers, and of workers' rights. Notwithstanding the difficulties, those who prepared the Report find Europe able to face the challenge, but it has to equip itself with a wide range of well-targeted actions.

### The new Title on employment

First the general provisions of the Amsterdam Treaty have to be recalled in order to identify the underlying framework and to indicate how the importance of employment issues has changed in relation to pure economic goals. In this respect the following provisions come under scrutiny: the amendment of art.B of the Maastricht Treaty, of art.2 and 3 of the EC Treaty. A very significant amendment was art.B of the Maastricht Treaty in that the aim of achieving a high level of employment was inserted into the objectives of the Union: *to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social*

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<sup>87</sup> Employment in Europe 1997 (on the basis of COM(97)479 final)

*cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.*

A similar amendment was made to art.2 of the EC Treaty, which set out the objectives of the Community. Although a high level of employment, as an objective of the Community, had already been inserted into art.2 of the EC Treaty at Maastricht, at Amsterdam, the order in which the objectives of the Community were listed, was now amended: the harmonious, balanced and sustainable development of economic activities is followed immediately by the high level of employment and social protection, not, as before, by sustainable and non-inflationary growth and other economic objectives. The importance attributed to employment was additionally highlighted by the new para.(i) inserted in art.3 supplementing the activities of the Community: *the promotion of co-ordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a co-ordinated strategy for employment.* From these amendments we can draw two immediate conclusions: On the one hand that the Union devotes special attention to employment, and, on the other hand, the economic context is still decisive: employment policies are deeply embedded in and largely dependent on the macro-economic framework.

At Amsterdam a new title on employment was incorporated into the EC Treaty, evidencing the priority given to the European employment situation and to the commitment to improve it. Yet some commentators express doubts regarding the altruistic nature of the new provisions, arguing that in the absence of a clear common vision of the future, employment has been used as one of the few unifying projects which could easily be understood and endorsed by European citizens.<sup>88</sup> Others focus on national interests in their interpretation: With high levels of unemployment in the EU, most governments sought the symbolic move of including a new chapter on unemployment in the Treaty; but while allowance was made by all -including the UK- for sharing information and emulating best practice, there was no chance of co-ordinating financial transfers or

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<sup>88</sup> Goetschy, Janine: *The European Employment Strategy: Genesis and Development* (1999) 5 European Journal of Industrial Relations p.124.



fundamental labour market reforms, meaning that co-operation could, in the end, be little more than symbolic.<sup>89</sup>

The provisions of the Employment Title entered into force at the end of 1997, on the basis of a political decision, a process which is in itself debatable, but the political pragmatism and the consensus of the contracting parties guaranteed that a legal conflict on the issue did not emerge.<sup>90</sup> The new title contains six articles (according to the renumbering of the Consolidated Treaty, arts.125-130) which are worthy of analysis.

Analysing the new provisions is a challenging task, as the language of the Treaty is not always unambiguous and a single interpretation can easily be misleading. The passage of time since the signature of the Treaty does not yet enable one to provide a sober, non-partial evaluation, but tendencies can be highlighted. The process of making sense of the provisions is helped by an analysis of earlier documents which had crystallised the commitments made in Essen and made their content more tangible. Most of the keywords of the Essen-Amsterdam period referred to above, such as multiannual programmes, a complex approach, institutionalised monitoring process, and an integrated employment strategy will re-surface in a more structured way.<sup>91</sup> Building on the understanding of these documents we can analyse the Treaty provisions, and their correct interpretation will be then tested by the documents produced on the basis of the Treaty or with the aim of implementing the Treaty. Though future events cannot be predicted, tendencies and value choices can be identified with considerable certainty.

**Art.125** provides for the development of a co-ordinated strategy for employment particularly for promoting a "skilled, trained and adaptable workforce and labour markets responsive to economic change." The provision is very abstract, it does not specify the

<sup>89</sup> Moravcsik, Andrew and Nikolaidis, Kalypso: *Explaining the Treaty of Amsterdam: Interests, Influence, Institutions* (1999) Journal of Common Market Studies, p.63.

<sup>90</sup> Weiss, Manfred: *Il Trattato di Amsterdam e la politica sociale* (1998) Diritto delle relazioni industriali No.1 p.9.

<sup>91</sup> Yet a committed scholar comments that from a substantive point of view, the new Treaty did not bring about innovations, since the same provisions had already been set out at the Essen European Council. (Blanpain, Roger: *Il Trattato di Amsterdam e oltre: il fine del modello social europeo?* (1998) Diritto delle relazioni industriali No.1. p.15.)

competence and the division of competence between the Community and the Member States. The article refers to the general provisions of the Maastricht Treaty (art.B) and of the EEC Treaty (art.2) modified at Amsterdam, reflecting the new emphasis placed on employment issues. What should be underlined is the emphasis on the input side, that is on the preventive approach, to make workers more adaptable in a labour market highly exposed to competition.

**Art.126** is more detailed, but not entirely unambiguous. The first paragraph contains a substantial point of reference: the Member States have to articulate their employment policies in a way consistent with the broad guidelines of economic policies. Practically it means that labour market and employment policies have to adapt to the conditions and constraints created by the EMU.

The second paragraph of this article contains two keywords: "common concern" and "co-ordination": *"Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall co-ordinate their action in this respect within the Council, in accordance with the provisions of Article 128."* The notion of common concern is further elaborated in the reference to national practices which immediately rules out uniformity. Nevertheless, it remains troublesome to apply the ideas of "common concern" and "co-ordination" simultaneously. It evokes the history of the original art.117 of the EEC Treaty which was the weak outcome of the political battles of that time.<sup>92</sup> At the 1996 IGC the story was very similar: some Member States were in favour of a close collaboration in the field of employment policy, whereas others wished to stop at the level of co-ordination.<sup>93</sup>

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<sup>92</sup> Although the issue was analysed in detail in an earlier part of the thesis, it should be briefly recalled: the central point of the discussion was whether the harmonisation of social provisions is necessary to the functioning of the common market or whether harmonisation will be the result of the functioning of the common market.

<sup>93</sup> See e.g. the opinion and preparatory documents of the Member States and the social partners for the Intergovernmental Conference of 1996. The ETUC argued for a more enhanced social dimension, and concrete means to diminish unemployment. (*The three challenges for the 1996 IGC: Employment, solidarity and democracy*) The UNICE, obviously, asked for more flexibility, less regulation. (EIRR 272 September 1996 p.15.) Among the Member States, France presented a *Memorandum for a European social model*,

One possible interpretation would be to think in terms of a kind of "gradual common concern". To understand this concept, art.99 should be recalled: "*Member States shall regard their economic policies as a matter of common concern and shall co-ordinate them within the Council, ...*" Although the texts of art.99 and 126 correspond, the final outcome of the two processes are the broad economic guidelines in the case of art.99, whereas in the case of art.126 a co-ordinated employment strategy.<sup>94</sup>

This "graduality" is also caused by the fundamental difference between the very notion of economic policies and of employment ones: The European economies, primarily the Euro-zone, are experiencing something previously unknown, that is the creation of a national economy for a group of states with different histories, language and institutions, which used to compete harshly with each other.<sup>95</sup> By contrast, national traditions, deeply rooted institutions, specific forms of industrial relations have not only an influential role but also form an unalienable part of a common employment strategy. If we add this difference to our discussion on common concern and co-ordination we can arrive at an interpretation that this "common concern to a smaller degree" means, first of all, the forced and at the same time voluntary acceptance of national diversity, caution and patience. Building on this approach, co-ordination takes on the meaning of convergence. The evolution described here is, again, not completely alien from the process which took place in the field of economic policies.<sup>96</sup> It is sufficient to mention the convergence criteria established by the Maastricht Treaty for the admission of Member States into the third phase of the EMU. In the coming debate, this convergence of national employment

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encouraging a closer social dimension, whereas the UK government launched a *White Paper for the IGC: A partnership for nations* advocating much looser integration.

<sup>94</sup> Numerous authors comment that the structure of the provisions on the common employment strategy shadows that of art.99 dealing with the adoption of the economic guidelines. See e.g. Langrish, Sally: *The Treaty of Amsterdam: Selected Highlights* (1998) 23 *European Law Review* p.16; *The EU jobs summit -will it really make a difference?* (1998) 288 *EIRR* January, 1998, p.34. In contrast, see: Silvana, Sciarra: *Parole vecchie e nuove: diritto del lavoro e occupazione* (1999) *Argomenti di diritto del lavoro* pp.377-379.

<sup>95</sup> Padoa-Schioppa, Tommaso: *Honoris causa lecture*, Università di Trieste, 19.11.1999.

<sup>96</sup> Though it is still early to say what effect the EMU will have on national employment policies, the most probable provisions tend to argue for co-ordination and then convergence of these national policies. (Biagi, Marco: *The European Monetary Union and Industrial Relations* (2000) 16 *IJCLIR* pp.39-45.)

performance will be advocated, although over a much longer time period than economic policies, for the reasons mentioned above.<sup>97</sup>

Bearing in mind this interpretation, art.127 contributes to our immediate understanding only to a limited extent. It says that the Community encourages the co-operation between Member States by supporting and, if necessary, complementing their action. This support, as we will see, has a very specific content not expounded here.

If art.126 is central to understand the substance of the new provisions on employment, art.128 is central for the procedure.<sup>98</sup> The Amsterdam Treaty institutionalised a particular path making continuous dialogue between the Member States and the Community easier, a process which means a novelty in Community level interest articulation. The institutions established in this paragraph are complex and the elements together form a whole which makes it possible to update and fine-tune the employment policies introduced in consequence of the new provisions. According to the text of the Treaty, the process begins with the Conclusions of European Council on the employment situation in the Community drawn up on the basis of the joint annual report of the Council and the Commission (para.1). On the basis of these conclusions, the Council prepares the employment guidelines (para.2).<sup>99</sup> Then each of the Member States provides a national report on the implementation of the employment guidelines (para.3). On the basis of the national implementation reports the Council evaluates the progress, and if it considers appropriate, makes recommendations to Member States on the proposal of the Commission (para.4). On the basis of this examination the Council and the Commission

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<sup>97</sup> On the contrary Blanpain argues that employment policies remain within national competence and the EC has only a supplementary and co-ordinating role. (Blanpain, Roger: *European Social Policies: One Bridge too Short* (1999) 20 Comparative Labor Law and Policy Journal p.498.)

<sup>98</sup> Some argue that the Amsterdam Treaty incorporated mainly procedural rules. (Rocella, Massimo: *Lavoro e mercato nella giurisprudenza della Corte di Giustizia* (1999) *Giornale di diritto del lavoro e di relazioni industriali* p.62.)

<sup>99</sup> It is the Commission which proposes the employment guidelines to the Council after consulting the European Parliament, the Economic and Social Committee, the Committee of Regions and the Employment Committee. The Council decides, acting by qualified majority.

make the joint annual report to the European Council on the employment situation in the Community (para.5)<sup>100</sup> and the cycle starts again.

**Art.129** supplements art.127: it provides details as to how the Council, on the proposal from the Commission, can encourage co-operation between Member States to support their action in the field of employment.<sup>101</sup> The incentive measures aim to develop exchanges of information and best practices, to provide comparative analysis and advice as well as to promote innovative approaches and evaluate experiences, in particular by recourse to pilot projects. Declaration No.23 is attached to this article, which provides that the incentive measures have to be based on an objective assessment of their need and the existence of an added value at Community level; their duration should not exceed five years; and the maximum amount of financing, which should reflect the incentive nature of such measures, has to be specified. It is important to note that the Treaty provisions explicitly exclude the harmonisation of national laws and regulations. Although one should not underestimate these incentive measures, the nucleus of the Commission's active participation, as mentioned above, lies elsewhere.

A new advisory body is established by **art.130**. The Employment Committee has the task of promoting co-ordination between Member States on employment and labour market policies by monitoring the employment situation and policies and by formulating opinions at the request of either the Commission or the Council, or on its own initiative. The Committee also contributes to the preparation of the employment guidelines and to the evaluation of the national employment plans. After the entering into force of the Amsterdam Treaty on 1 May 1999 the Employment Committee took over the work carried out so far by the Employment and Labour Market Committee, and this latter Committee was dissolved.<sup>102</sup>

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<sup>100</sup> Although the evaluation of the national implementation reports and the preparation of the joint employment report are treated separately, in 1999, when recommendations were for the first time proposed by the Commission, these proposals were published together with the draft joint employment report.

<sup>101</sup> One commentator describes this as the only achievement of the new provisions. (Betten, Lammy: *The Amsterdam Treaty: Some General Comments on the New Social Dimension* (1997) 13 *IJLLIR* p.189.)

<sup>102</sup> Draft Joint Employment Report 1999. p.11.

### The Employment Guidelines

To demonstrate the political commitment and to launch the process envisaged by the Treaty, an extraordinary European Council, the Jobs Summit, took place at Luxembourg, at the end of November 1997. The Council adopted the first Employment Guidelines for 1998 on 15 December 1997.<sup>103</sup> The Employment Guidelines are based on four pillars, namely employability, entrepreneurship, adaptability and equal opportunities.<sup>104</sup> On this foundation, 19 guidelines were articulated, laying down specific tasks the Member States have to fulfil.<sup>105</sup> The 1998 National Action Plans (NAPs) were the first answers to this new obligation towards the Community. In January 1998 the Commission published a document on the format of the NAPs. The successful execution of this task was supported by the Commission by series of working meetings with the national authorities. The main purpose of the working meetings and the auxiliary document was to ensure a uniform interpretation of the guidelines and of the tasks deriving from them. The Commission has borne in mind that the differing situations of the Member States in relation to the problems addressed to them and the different traditions in dealing with these problems would bring about different solutions and emphases. The Commission has been keen on enabling the Member States to apply quantified objectives in order to be in the position to monitor the progress in implementation. And the Member States have been eager since the very beginning to fulfil the requirements envisaged by the new rules. Biagi discusses the first evaluation document by the Commission on the NAPs,<sup>106</sup> in which Italy was not mentioned in relation to a specific point. This silence appeared to suggest that the Commission had already decided to propose a recommendation to the Council to remind Italy of its Community obligations regarding

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<sup>103</sup> On the basis of the Commission Communication: Proposal for Guidelines for Member States Employment Policies 1998; COM(97)497

<sup>104</sup> These pillars are equally called as the jobs gap, the skills gap, the participation gap and the gender gap (*An interview with Pdraig Flynn* (1998) 288 EIRR January, 1998 p.20.)

<sup>105</sup> The 1999 and 2000 Employment Guidelines maintained the integrated and multiannual approach and the four-pillar structure, with only some minor modifications to achieve greater efficiency by a more precise targeting. Some further guidelines were also added. (see the 1999 Employment Guidelines COM(98)574; 22.02.1999 and the 2000 Employment Guidelines COM(99)441; 08.09.1999.)

<sup>106</sup> From guidelines to action: the national action plans for employment (a Commission document drawn up on the basis of COM(98)316 final; May 1998)

employment.<sup>107</sup> And this attitude of the Member States can also be generalised, even if the Treaty did not introduce sanctions to force Member States to act in conformity with the Employment strategy<sup>108</sup>

Although each of the pillars of the Employment Guidelines are equally important, the key guidelines can be found under the employability<sup>109</sup> pillar which contain the three Community-wide operational targets.<sup>110</sup> The first two operational targets are to offer to the unemployed, particularly the young unemployed and the long-term unemployed, a new start before they reach, respectively, 6 or 12 months of unemployment.<sup>111</sup> The third operational target aims to increase the participation of the unemployed in active labour market measures, by fixing the goal of gradually achieving the average of the three most successful Member States or at least 20% participation.<sup>112</sup> Most of the 1998 NAPs concentrated on the implementation of these guidelines, and at times neglected those under the adaptability and equal opportunities pillars. The Commission's evaluation referred very critically to those proposals where the Member States put forward mere lists of vague initiatives, and it asked for appropriate indicators and precise policy objectives, wherever possible, such as indication of time scales, resources, monitoring indicators, budget implications and cost efficiency. The Commission underlined that the aim of the

<sup>107</sup> Biagi, Marco: *Implementation of the Amsterdam Treaty with Regard to Employment: Co-ordination or Convergence* (1998) IJCLLR p.332.

<sup>108</sup> Kenner, Jeff: *Employment and Macroeconomics in the EC Treaty: A Legal and Political Symbiosis?* (2000) 7 Maastricht Journal of European and International Law p.396.

<sup>109</sup> The history of the concept of employability tells us a rather adventurous story. In the US, between the 1950 and 1970 policy makers spoke about the employability of those who were considered as unemployable because of illness, incapacity or delinquency. By contrast, in the Scandinavian context, employability has been used as a means to maximize the use of the human resources of the active population. This interpretation recognizes the collective responsibility of a society to promote the capacity and adaptability of the entire workforce. This responsibility is shared not only by the workers, but equally, by their employers and by public authorities. This interpretation was taken on board by European social policies, and in order to make a sharp distinction with the American model, some policy makers and scholars prefer to apply the category of "capacity of professional insertion". (Chassard, Yves and Bosco, Alessandra: *L'émergence du concept d'employabilité* (1998) Droit Social pp.903-904.)

<sup>110</sup> *An interview with Padraig Flynn* (1998) 288 EIRR p.20. The Commission proposed more quantified targets but during the negotiations with the Member States these objectives evaporated because of the firm opposition of the Spanish and German governments.

<sup>111</sup> Implementing a preventive approach so as to reduce significantly the inflow of young and adult unemployed persons into long-term unemployment (guidelines 1 and 2).

<sup>112</sup> Shifting people from welfare dependency to work and training, namely through a more active labour market policy (guideline 3).

NAPs is to function as operational instruments, not as a general policy orientation, thus precise information is needed on the progress made.

When evaluating the first NAPs, one must not forget that the Member States had a very short time to prepare their own action programmes and, what is more important in this respect, they could not, at this time make any new budgetary commitments, as the policy measures for 1998 were already fixed in the national budgets. Thus there was only a narrow space in which to convert existing national measures into co-ordinated policy measures standardised by the Luxembourg process. However, the first exercise proved to be a valuable framework within which the European employment strategy could evolve and develop. This framework provides the opportunity to identify innovative measures and best practices which can further promote this strategy. In order to fulfil these requirements, the Commission found that the elaboration of more comparable employment indicators was indispensable.

The overall concept of the NAP exercise is underpinned, on the one hand, by the comprehensive view of a European employment strategy which includes a multiannual programme and a preventive and inclusive approach, on the other by the elaboration of precise operational targets and policy indicators. Given such a framework, the Commission has a task which goes well beyond that of encouraging co-operation. Using the words of the Treaty, the task assigned to the Commission is not less than the role of co-ordinator of a strategy which is of common concern.<sup>113</sup>

#### The Commission as an independent actor

Now we have to examine whether the Commission is empowered to play a substantial role in the formulation, implementation and monitoring of the employment strategy.

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<sup>113</sup> Commission officials working in the Employment DG have always been convinced about this role of the Commission in a convergence process. (Pavan Woolfe, Luisella: *The European Strategy for Employment - What Lies Ahead?* (2000) 16 IJCLIR pp.299-303. The author is acting director of the Employment DG, European Commission)



Our starting point is again the text of the Treaty and we can again confirm that the Commission has a rather limited scope for intervention. The provisions of the Employment Title do not confer the Commission with the role of promoting co-operation between the Member States, its role is restricted to proposal making. However, this role should not be underestimated, as it is the Commission which formulates the draft recommendations on the implementation of the NAPs for the Member States which is then finalised by the Council (art.128(4)). According to art.129 the Council acts, again on the proposal of the Commission, to adopt incentive measures designed to encourage co-operation between the Member States and to support their actions.

If the Commission wants to provide support and to elaborate recommendations it has to undertake substantial activity which goes far beyond data collection and the formal promotion of co-operation. To benchmark best practice, to choose the appropriate innovative methods and, to formulate recommendations, the Commission has to go beyond the exercise of data comparison; it has to monitor the activity of the Member States, and it has to create objectives and indicators for comparative purposes. However, the emergence of this activity, going beyond the letter of the Treaty but not its spirit, is troublesome. Looking at the jurisprudence of the Court of Justice a case on the interpretation of art.118 can help one understand the conditions under which the Commission would be able to fully carry out its tasks.<sup>114</sup>

On the basis of art.118 of the EC Treaty the Commission can act closely with the Member States in order to promote a close co-operation between the Member States in the social field, by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations. Relying on these provisions, the Commission published a decision instituting a preliminary procedure of communication and of negotiation on immigration policy in relation to third countries.<sup>115</sup> The Commission argued that immigration policy falls within

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<sup>114</sup> Federal Republic of Germany and Others v Commission of the European Communities (Joined Cases 281, 283 to 285 and 287/85) [1987] ECR 3203

<sup>115</sup> Commission Decision 85/381; OJ L 217/25; 1985

the scope of art.118, as workers from non-member countries influence the employment and working conditions in the Community. However, the Danish, French, Dutch, German and British governments challenged the decision before the Court of Justice, arguing that the decision was void because the Commission exceeded its competence and it was not empowered to enact binding measures. In fact the interpretation of art.118 is rather contradictory, as Federico Mancini argues, acting in the present case as Advocate General of the ECJ: it can be seen, that art.118 implicitly recognises that the elaboration of norms in the field of labour is a matter of Member States' competence, but then it grants the Commission power to co-ordinate the role played by national legislators. The article is silent with respect to the only means -adopting binding measures- which would enable the Commission to exercise this power efficiently.<sup>116</sup>

The judgement of the Court was rather cautious, it said that art.118 confers a specific task on the Commission and this must be accepted, if that provision is not to be rendered wholly ineffective; the article also necessarily confers on the Commission the powers which are essential to carry out that task.<sup>117</sup> But in the case in hand the Commission exceeded its competence and the decision was annulled. The ECJ accepted the argument of the applicant countries that the Commission exceeded its purely procedural competence to set up the notification and consultation machinery, by seeking to determine the results of such consultations.<sup>118</sup> The decision as revised following the judgement of the ECJ did not create any landmark in the history of the Community. It contained no binding provisions and the Member States did not feel obliged to collaborate.<sup>119</sup>

It is useful to dwell on what can be learnt from this case. Do the provisions of the new employment title of the Amsterdam Treaty contain an (implicit) empowerment of the

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<sup>116</sup> Mancini, Federico G.: *Politica comunitaria e nazionale delle migrazioni nella prospettiva dell'Europa sociale* (1989) 29 *Rivista di Diritto Europeo* p.314.

<sup>117</sup> *Federal Republic of Germany and Others v Commission of the European Communities* (Joined Cases 281, 283 to 285 and 287/85) [1987] ECR 3203. point 28. of the Judgment of the Court.

<sup>118</sup> *Federal Republic of Germany and Others v Commission of the European Communities* (Joined Cases 281, 283 to 285 and 287/85) [1987] ECR 3203. points 33-34. of the Judgment of the Court.

<sup>119</sup> Commission Decision 88/384; OJ L 183/35; 1988

Commission, which is lacking in art.118 of the EC Treaty? Or, put differently, do these provisions push the Commission to establish a form of co-operation compatible with national sovereignty, which is not subject of supranational constraints and acceptable to the Member States?<sup>120</sup> The keyword of art.118 EC, just like in the provisions of the new Title on Employment is "co-operation". But compared to art.118 EC, the co-operation put forward in the new employment title is supplemented by the notion of "common concern". Although this common concern, as discussed earlier, is a rather ambiguous category, it is exactly this common concern which provides the legitimisation for the Commission to go beyond a purely procedural role. In addition, the final result of the process is a co-ordinated strategy for employment, which, in itself presupposes a substantial competence.

We now turn to examine the power the Commission has acquired under the Amsterdam Treaty. We enumerate, partly repeatedly, the most important activities and documents of the Commission in the context of building the European employment strategy. The intention is to point out how the Commission has built up its power so as to eliminate any doubt about its leading role in the convergence of European employment policies.

Immediately after the establishment of the Employment Guidelines at the end of 1997, the Commission issued a communication on the form of the 1998 National Employment Action Plans, requiring that they should be presented in a harmonised way and contain some elements defined in advance. The Commission document states that the NAPs should ensure the transposition of the guidelines into national administrative, regulatory and other measures. They have to be based on a multiannual approach, and they have to contain deadlines and as many quantified objectives as possible to ensure an effective evaluation.<sup>121</sup> In order to help the Member States, in particular during the first

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<sup>120</sup> Mancini commented with these words that the above judgment of the ECJ represented a missed opportunity in Community law. (Mancini, Federico G.: *Il governo dei movimenti migratori in Europa: cooperazione o conflitto* (1992) in: AA.VV.: *Il governo dei movimenti migratori in Europa: cooperazione o conflitto* p.27.)

<sup>121</sup> Format of the 1998 National Employment Action Plans, Commission, January 1998.

year of the Luxembourg process, the Commission organised a series of meetings with the representatives of the Member States.<sup>122</sup>

This working method contributed to creating a single system for the NAPs. The approach was further enhanced by the establishment of some common policy indicators, besides the three Community-wide operational targets.<sup>123</sup> Both the Commission and the Member States faced a completely new task when they had to translate the guidelines into concrete policy measures and to monitor the achievements regarding the published policy goals. The result of the preliminary discussions between the representatives of the Commission and the Member States was that, in order to achieve efficient monitoring, two main types of indicators had to be created: input indicators to measure the effort undertaken by the Member States in implementing the policies and approaches recommended under the guidelines; and output indicators giving feedback on the effectiveness of the policies implemented. The establishment of common policy indicators concentrated on the three Community-wide operational targets. The basic indicators were set up with the fundamental aim of prevention and activation. The following policy actions were proposed: training measures (including the opportunity to return to the standard education system or to enter adult education); job-training measures or schemes; individual action plans; subsidised employment (work experience, traineeship); job schemes for disadvantaged categories of unemployed people; vocational counselling and guidance; and start-up support.<sup>124</sup>

By setting up operational targets and policy indicators, the Commission showed a desire for quantifiable results. By creating such indicators, the Commission was also able to decide the content of the policies and the means to achieve the desired results. The establishment of these categories is a powerful, substantial task, and the Commission has found itself in a kind of trap. It wanted to set up only quantitative indicators, so neatly

<sup>122</sup> These meetings were held in the Member States between January and March 1998. (From guidelines to action: the national action plans for employment, COM(98)316 final, p.5.)

<sup>123</sup> Common policy indicators for monitoring the employment guidelines (Draft document, V/A2/FR/indELCdraft2 D(99); 19 February 1999)

<sup>124</sup> Common policy indicators for monitoring the employment guidelines; Draft document, V/A2/FR/indELCdraft2 D(99); 19 February 1999. p.4.

described in the first set of Guidelines, but it now faces a different sort of problem from that raised by the attempt to quantify national efforts: as soon as the Commission attempts to undertake comparative analysis, it cannot take the national categories for granted, but has to define the exact meaning and content of the indicators. And this task, at least for the time being, is not yet completely resolved.<sup>125</sup>

The emerging problems are manifold: technical, that is statistical, the lack of comparable data,<sup>126</sup> procedural, legal, political, where the efforts and the consensus of the Member States are not sufficient. Taking only one example, regarding the concept of employability, it is not yet clear whether the idea is to improve the chances of the unemployed to get a job, that is to say this policy will increase the total number of available jobs or whether employability simply means a better position in the queue of those waiting for a job provided after the participation in various training schemes.<sup>127</sup>

Remaining with the employability pillar, Guidelines 1 and 2 contain an extremely sensitive problem. As mentioned, recalled these Guidelines provide that a new start has to be offered to young and long-term unemployed before they reach six and twelve months of unemployment, respectively. Experts from the Member States and from the Commission agreed that they have to distinguish between the process leading to a new start and the new start itself.<sup>128</sup> The new start referred to in the guideline is not a job-guarantee. It means providing the individual with capabilities and opportunities to give them a real chance to gain access to jobs in the open labour market.<sup>129</sup> But the

<sup>125</sup> The technical and scientific competence of the Commission for developing such strategy is also contested. (Pochet, Philippe: *The New Employment Chapter of the Amsterdam Treaty* (1999) 9 *Journal of European Social Policy* p. 275.)

<sup>126</sup> E.g. the promotion of life-long learning was introduced in the Employment Guidelines only in 1999 as national figures did not allow proper monitoring and the Member States came to an agreement only for that year. (Pavan Woolfe, Luisella: *The European Strategy for Employment - What Lies Ahead?* (2000) 16 *IJCLLR* p.301.)

<sup>127</sup> Chassard, Yves and Bosco, Alessandra: *L'émergence du concept d'employabilité* (1998) *Droit Social* p.904.

<sup>128</sup> For technical purpose some Member States preferred the concept of participation instead of the one of "offer", as it is rather difficult to provide statistical data on offers made especially if the same offer is made to more than one unemployed.

<sup>129</sup> Sciarra argues that some modern social rights can be enforced through proceduralisation more than through the traditional judicial enforcement. (Sciarra, Silvana: *Diritti sociali. Riflessioni sulla Carta europea dei diritti fondamentali* (2001) *Argomenti di Diritto del Lavoro* p.16.)

responsibility is also on the side of the individual unemployed person to respond to the opportunity and incentives provided.<sup>130</sup>

On the abstract level the notion of "offer a new start" raises further difficulties. A first problem in relation to the concept of "offer a new start" relates to the possibility of enforcement: The Employment Guidelines are enacted in the form of a Council Resolution. It is an open question whether soft law allied to the provisions in the Employment Title provides a basis for enforcing a Community guidance against a Member State which wishes to choose its own path.<sup>131</sup>

A further difficulty emerges in respect of who is obliged to "offer a new start"? According to the Treaty it is within the competence of the Member States to introduce and articulate employment policies. But the Member States have to regard employment as a common concern and at the end of the process there is the co-ordinated strategy for employment. In this co-ordination, as we have seen, the Commission has a substantial role. The Commission, through the establishment of policy indicators and the monitoring process, has brought upon itself not only a right, but also an obligation, to ensure the continued maintenance of the conditions "to offer a new start". This leads to a shared responsibility between the Member States and the Commission over employment policy.

The outcome of the process established by the Amsterdam Treaty is not a static one, but a dynamic process, which is under formation, and subject to fine tuning. The emphasis is on the continuous participation of the Member States, public authorities and the Commission. For an efficient process, precise targeting is needed, and this is the point where both the input and output indicators play a crucial role. And these indicators have proven to be the only means to monitor Member States' performance.

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<sup>130</sup> Employment in Europe, 1998 (COM(98)666 final) pp.18-19.

<sup>131</sup> Kenner, Jeff: *The EC Employment Title and the 'Third Way': Making Soft Law Work?* (1999) 15 *IJCLIR* p.58; Weiss, Manfred: *Il Trattato di Amsterdam e la politica sociale* (1998) *Diritto delle relazioni industriali* No.1. p.8.

The Amsterdam Treaty created the legal basis for comprehensive labour market policies. This milestone means both the completion and the beginning of a process. It is an outcome, because as the historical review undertaken by this thesis demonstrated, Community social policies have always been tied to the labour market, and the codification at Amsterdam was the formal recognition of those policies and practices, legal and soft law measures which have already characterised this field. But Amsterdam seems to be the starting point of another process as well. In its content this new process is the continuation of the former one, but the novelty is the qualitative switch: various Summits and documents bear witness to the commitment that the Union is engaged in a balancing process which privilege other values, mainly social, and not just the values of market integration.

One sign of this balancing process is the European Employment Strategy itself, which has been carried out both by the Member States and the Commission with diligence and dedication since the new Title of the Amsterdam Treaty entered into force, and which has begun to bring tangible results in the form of decreasing unemployment.<sup>132</sup> Recent European Councils have confirmed the commitment to take further measures.<sup>133</sup> The Cologne European Council launched the European Employment Pact. It established an economic policy triad combining three processes: the Luxembourg process on employment, the Cardiff process for comprehensive economic reforms and the Cologne process. This latter includes the creation of a Macro-economic Dialogue to promote a closer interaction between the economic and social sphere using the already existing institutional framework. Pochet argues that although the content of the Pact may be vague, the procedure is becoming more explicit, with central bankers, finance ministers and social partners forming a new triangle.<sup>134</sup> The harmonious mixture of employment and

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<sup>132</sup> Indicative figures on unemployment, August 2001: Euro-zone: 8.3%; EU15: 7.6% (Eurostat, Euro-indicators, news release No.101/2001; 02.10.2001.)

<sup>133</sup> Cardiff European Council, 15-16 June 1998; Vienna European Council, 11-12 December 1998; Cologne European Council, 3-4 June 1999; Tampere European Council, 15-16 October 1999; Lisbon European Council, 23-24 March 2000; Santa Maria da Feira European Council, 19-20 June 2000; Nice European Council 7-9 December 2000.

<sup>134</sup> Pochet, Philippe: *The New Employment Chapter of the Amsterdam Treaty* (1999) 9 Journal of European Social Policy p. 272.

macro-economic policies comes as a result of the new provisions of the Amsterdam Treaty.<sup>135</sup>

One other sign of the strengthening commitment to social values in the process of integration can be found in the Amsterdam Treaty. Whilst not intending to examine the detail, it is important to note that the Amsterdam Treaty amended the Social Provisions (arts.136-145), incorporating into the text of the Treaty the Social Chapter annexed to the Maastricht Treaty. Art.136 extended the Community competences in the social field, and reference was made to the European Social Charter and to the Community Charter of 1989.<sup>136</sup> Although contradictions and tensions may emerge between the Employment and Social provisions, it is equally possible that these two sets of provisions can mutually reinforce each other, to stimulate employment and improve the character of employment in Europe.<sup>137</sup>

A recent achievement in the balancing process is the Charter of Fundamental Rights of the European Union adopted in the form of solemn declaration at the Nice Summit, in December 2000.<sup>138</sup> It was the Cologne European Council in June 1999 which launched the process which drew up a Charter. In its substance the Charter is strictly linked to the Simitis Report<sup>139</sup> which was devoted to the strengthening of the role of fundamental rights in the Union. The huge amount of academic contributions discussing the varied aspects of the Charter indicate the importance attributed to this document.<sup>140</sup>

<sup>135</sup> Sciarra, Silvana: *The Employment Title in the Amsterdam Treaty: A Multi-language Legal Discourse* (1999) in: O'Keefe, D. and Twomey, P. (eds): *Legal Issues of the Amsterdam Treaty* pp.164-165.

<sup>136</sup> art.136 (ex art.117) of the Treaty: *The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*

<sup>137</sup> Szyszczak, Erika: *The New Parameters of European Labour Law* (1999) in: O'Keefe, D. and Twomey, P. (eds): *Legal Issues of the Amsterdam Treaty* pp.153-154.

<sup>138</sup> OJ C 364; 18.12.2000.

<sup>139</sup> *Affirming Fundamental Rights in the European Union - Time to Act*; February, 1999

<sup>140</sup> Just to give a few examples: De Búrca refers to the new form of constitution building (De Búrca, Gráinne: *The drafting of the European Union Charter of fundamental rights* (2001) 26 *European Law Review* pp.126-138.) Von Bogdandy offers an analysis whether the Charter can contribute to the substantial transformation of the Union's legal system where human rights can have a role in determining rather than



On a political level the most important objective of the Charter was to make rights visible and known to European citizens,<sup>141</sup> and to promote citizens' awareness of their rights as well as their loyalty to the European integration process.<sup>142</sup>

Although the Charter at present remains a solemn declaration, it cannot be said that it will completely lack binding force. It will be sufficient to mention Advocate General Tizzano, who in delivering his opinion on 8 February 2001 in a case on preliminary ruling, made reference to the Charter: "I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons- in the Community context."<sup>143</sup>

In its content the Charter goes beyond the fundamental rights recognised by the Court of Justice, but falls short of the criteria for the protection of those rights which potentially belong to the *acquis communautaire*.<sup>144</sup> However, in some respects the Charter is extremely modern compared to the other human rights documents which served as its inspiration, since it deals with phenomena such as the prohibition of trafficking human beings (art.5) the protection of personal data (art.8) the right of conscientious objection (art.10) and some principles in the field of medicine and biology such as the reproductive cloning of human beings (art.3).

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simply limiting the system. (Von Bogdandy, Armin: *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union* (2000) 37 CMLReview pp.1307-1338) Lemmens examines the relation of the Charter to that of the Council of Europe. (Lemmens, Paul: *The Relation between the Charter of Fundamental Rights of the Union and the European Convention on Human Rights - Substantive Aspects* (2001) 8 Maastricht Journal of European and International Law pp.49-67.)

<sup>141</sup> *The EU Charter of Fundamental Rights is still under discussion -editorial comments* (2001) 38 CMLReview, p.2.

<sup>142</sup> De Witte, Bruno: *The Legal Status of the Charter: Vital Question or Non-Issue?* (2001) 8 Maastricht Journal of European and International Law, p.83. Heringa was more critical and considered the Charter as the selling point of the Union (Heringa, Aalt Willem: *Towards an EU Charter of Fundamental Rights?* (2000) 7 Maastricht Journal of European and International Law, p.111.)

<sup>143</sup> *BECTU v Secretary of State for Trade and Industry* (Case C-173/99) Opinion of Advocate General Tizzano, par.28.

<sup>144</sup> Lenaerts, Koen and De Smijter, Eddy: *A "Bill of Rights" for the European Union* (2001) 38 CMLReview p.280.

Social rights are to be found mainly under the heading of "Solidarity". Although some provisions of the Charter are ambiguous and in other cases contradictions can be explored, nevertheless, no one can deny that the social rights collected in the Charter reflect the importance of the fundamental values of the European social model. And what is a more tangible feature is what the Charter, as an example of constitutionalisation, can represent in a counterweight to policy-making, to the ever-growing recourse to soft law measures.<sup>145</sup> In other words: the highly flexible structure of employment policies<sup>146</sup> can be mainstreamed by the Charter<sup>147</sup> potentially limiting a "race to the bottom" of social standards and leading to the combination of flexibility with security.

The balancing process between economic and other values within the process of European integration has started, but its consolidation depends on future developments. The climate is promising. At the same time the present situation requires the adaptation, if not the redefinition of labour lawyers' vocabulary: labour law after Amsterdam is regarded as an integral part of the European Employment Strategy and as a tool for its implementation. The EES has become an accepted framework for national employment and social policies, and also for the co-ordination of national legislation.<sup>148</sup> It is a challenge for labour lawyers to understand, to analyse the *status quo* and to propose forward looking solutions in this complex field which is composed of formerly rather distinct territories. The past provides substantial assistance: the new discourses are built up from elements of former processes.

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<sup>145</sup> Sciarra, Silvana: *Diritti sociali. Riflessioni sulla Carta europea dei diritti fondamentali* (2001) Argomenti di Diritto del Lavoro p.13.

<sup>146</sup> Shaw, Jo: *Introduction* (2000) in: Shaw, Jo (ed): *Social Law and Policy in an Evolving European Union* p.11.

<sup>147</sup> Gijzen, Marianne: *The Charter: A Milestone for Social Protection in Europe?* (2001) 8 Maastricht Journal of European and International Law, p.42.

<sup>148</sup> Bruun, Niklas: *The European Employment Strategy and the "Acquis Communautaire" of Labour Law* (2001) 17 IJCLLR p.323.

## **Chapter VI**

### **CONCLUSIONS: WHAT AN APPLICANT COUNTRY HAS TO FACE. THE CASE OF HUNGARY**

A very critical approach has characterised the thesis, which proved to be useful to an understanding of the fundamental notions, context and evolution of European social policies. The historical analysis was indispensable to reach a perception of value choices articulated in a particular political context, when the European Community, then Union decided to begin, to develop and to deepen the integration process.

The beginning of this thesis sought a definition applicable in the context of the Community's, then Union's, social dimension, in order to observe how its content is weak and boundaries imprecise when compared to social policy at national level. However, changing this internal contrast -Community *vis-a-vis* Member States- with an external one the elements of this same social dimension can be put in a different light. This clarification renders the long and detailed examination of Community social policies valid and now the research findings can be evaluated from a different perspective: what does an applicant country have to face at the eve of the Eastern enlargement.

There are a great number of areas where the applicant countries face similar difficulties: they all had to transform their inherited political systems and state economies according to the requirements of the Copenhagen criteria. These criteria have been used to benchmark the progress of the candidate countries since 1993. They envisaged the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy, as well as

the capacity to cope with competitive pressures and market forces within the Union;<sup>1</sup> and the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

However, as each of these countries has its particular characteristics, to carry out a general evaluation would be a rather difficult task which, at the end, would lead to a rather superficial comparison. The existing differences are even more significant in areas such as labour law and social policies. This is why the evaluation concentrates on only one country: on the case of Hungary.

The fundamental concepts at the heart of European social policies can be contrasted with the situation of a country preparing for accession and with the effort it has to take. This comparison bears witness that although Hungary is on the way to transposing the *acquis communautaires*, the government in office does not seem prepared to formulate actual social policies to conform to the European Employment Strategy. More precisely: the normative catching-up process is nearly completed, yet there is no sign that policy measures have been instituted, anticipating the requirements of the Employment Strategy. This omission is grave not only with regard to the obligations of membership, but also, and this is more important, because structural unemployment and social exclusion characterise today's Hungarian society. The Employment Strategy offers a means to improve the situation and, at a later stage, to anticipate the drastic impact of accession.

#### Legislative issues: transposition of the *acquis communautaires*

The technical efforts which the applicant countries have to carry out relate mainly to the *acquis* screening, transposition of the Community legal norms and adjustment of the national institutional system to that of the Community's. This includes for social and labour legislation as well. As illustrations of the process taking place, the Commission's

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<sup>1</sup> According to data registered in 2000 the Czech Republic had 68% of the EU average per capita GDP, Hungary 58% and the other applicant countries had even lower averages, with the exception of Slovenia. The GDP of the ten applicant countries amounts to 4% of the total EU GDP which is equal to the Dutch GDP, though the population of these countries is of 28% of the total EU population. (source: Eurostat)

Country Reports can be used.<sup>2</sup> The first Report, of July 1997 was mainly descriptive and it concluded that Hungary is likely to be able to take on the *acquis* in the social area in the medium term.<sup>3</sup> It is worthwhile noting that when this Report was prepared the Association Agreement<sup>4</sup> was already in force, but the negotiations for membership had not yet begun. These negotiations were launched in March 1998 and after this date the Reports became much more specific.

Turning to the examination of the achievements in the field of labour law and social policies, the first item to be mentioned is a new law on equal opportunities of disabled people, of January 1999. Although there is still a lot to do for example in improving the access to public buildings, the necessary institutional framework has been created and numerous action programmes have been established. Companies employing more than 20 persons have to reserve 5% of their posts for disabled people.<sup>5</sup>

In July 1999, Hungary ratified the European Social Charter of the Council of Europe, which was a major step in the alignment of Hungarian social legislation to the Treaty on the European Union. However, some articles were not ratified because of their financial implications, such as art.4 on the right to fair remuneration and art.12 on the right to social security.

According to the Commission's Report for 2000, further progress was made in terms of legal transposition in all areas. In April 2001 the Labour Code was amended to further conform to the *acquis* on collective redundancies, the contract of employment relationship, health and safety of atypical workers, the organisation of working time, the protection of young people at work, European Works Councils, posting of workers and

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<sup>2</sup> The Reports are accepted by all actors within Hungarian political and social life as objective evaluations.

<sup>3</sup> Commission Opinion on Hungary's Application for Membership of the European Union COM(97)13 p.89.

<sup>4</sup> Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part OJ L 347/31.12.1993. The Agreement entered into force on 1 February 1994.

<sup>5</sup> Könczei, György; Kogon, Mihály: *Két törvény, háttérük és egy meglepetés. Gazdasági és szociális jogok politikai összefüggésben az ezredforduló Magyarországon* (2000) in: Magyarország politikai évkönyve pp.434-441.

equal treatment with regard to equal pay for equal work.<sup>6</sup> However, implementation of legislation is frequently scheduled to take place at a later date, or in some cases not until the time of accession. This will make it difficult to monitor implementation and enforcement. The Commission Report underlined that further efforts are needed in the fields of equal treatment and health and safety.

Though in 1997 a comprehensive three-pillar pension system was introduced, which in itself was a very positive step, the Report for the year 2000 notes that the government failed to increase its planned contribution, a fact which might call into question its commitment to the pension reform.<sup>7</sup>

Although Hungary is relatively advanced in terms of legal transposition of the employment and social affairs *acquis*, there is a burning need to reform the public health system. Health care indicators are low but they place a heavy burden on public finances. The government has to develop a coherent and systematic programme of reforms, which will both lead to healthier outcomes and address the difficult financing issues. More emphasis has to be placed on improving the effectiveness of health care provided for vulnerable groups.

#### The functioning of the social dialogue

Tripartite organisations have an outstanding importance from various points of view. First of all, in each Central and Eastern European Country functioning tripartite bodies played a major role in making possible a peaceful transition from the party and state driven systems towards a market-based economy.<sup>8</sup> At the beginning of the transition process, there was a general commitment, shared by all participants, to move the existing economic system towards a market economy, and there was a consensus on the fact that governments have to guarantee the active participation of the social partners in the

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<sup>6</sup> Law 2001:XVI; Official Journal 4 May 2001.

<sup>7</sup> 2000 Regular Report from the Commission on Hungary's Progress towards Accession, p.38.

<sup>8</sup> On the experience of the Czech and Slovak Republics, Hungary and Poland see: Carabelli, Umberto; Sciarra, Silvana (eds): *New Patterns of Collective Labour Law in Central Europe* (1996)

definition of economic and social programmes at a national level. The national level social dialogue was basically the only forum where co-operation and negotiations could take place, since at sectoral and company level, collective bargaining had weakened dramatically as a consequence of the radical changes in the world of work. On the one hand, new trade unions had to make practical use of their recently gained independence, on the other attracting foreign investors has been considered more important than ensuring higher wages and better working conditions.<sup>9</sup>

To give a fuller picture of the Hungarian situation, it is necessary to say a few words about company level and sectoral social dialogue.<sup>10</sup> While national tripartite dialogue functioned fairly well, sectoral and company level labour relations have been neglected, and this situation has been regularly criticised in the Commission's annual country reports. Sectoral level collective agreements have remained, until recently, very weak, and covered only 8-12% of workers between 1993-1999. Although the Labour Code exempts companies which sign such agreements from certain labour law requirements, employers do not seem to be interested. If anything, sectoral agreements serve to hold back local wage demands, as in the clothing industry where wages are set close to the national minimum wage. Although there is a large number of company-level collective agreements, research findings show that in most cases they contain only superficial regulation of the employment relationship.<sup>11</sup> One solution to change the situation would not necessarily be the direct intervention through legislation, but a major change in attitude by the representatives of the two sides of the industry, so that both can realise that co-operation and negotiation can bring about mutual benefits. There is an urgent need to create a climate of mutual confidence and respect, and the parties have to adopt a constructive approach. Of course this kind of development requires a long period of time.

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<sup>9</sup> Casale, Giuseppe: *Experiences of Tripartite Relations in Central and Eastern European Countries* (2000) 16 IJLLIR pp.130-131.

<sup>10</sup> In 1997 the rate of union membership was almost 40% (1997 Regular Report from the Commission on Hungary's Progress towards Accession, p.19.) whereas in 2000 it was only around 30% (2000 Regular Report from the Commission on Hungary's Progress towards Accession, p.28.)

<sup>11</sup> Yet there is a small group of companies which regularly reviews collective agreements, adjusting them to the changing conditions, with the agreement of both parties. (Neumann, László: *Decentralised Collective Bargaining in Hungary* (2000) 16 IJLLIR pp.117-122.)

Turning back to national level collective bargaining, we have to admit that after the consensus-based transition, interests have become polarised and when economic consolidation took place, the previously successful tripartite institutions were amended. In 1999 the Interest Reconciliation Council, which had spanned the transition period, came to an end. The government in office revised the previous tripartite system both substantially and formally: it not only redistributed the competences but revised and enlarged the number of participating actors. As an outcome of the process a new institutional framework was established.

The former Interest Reconciliation Council was replaced and supplemented by five bodies: the National Economic Council, The National Labour Council, the National ILO Council, the Council of European Integration and the Social Council. This way the number of actors and forums multiplied and tripartite dialogue was replaced by a multipartite one, in which the world of work and economic issues became separated. The National Economic Council envisages the participation of the two sides of the industry and the actors in economic life, such as the National Central Bank or multinational companies. The Council has no decisional competence, the government uses it as an information forum and the meetings are closed to the public. The social partners have been rather unhappy about the changes: they can no longer influence the annual laws on budgetary, tax and social insurance issues. In this way, the importance of the national tripartite dialogue has been substantially diminished compared to previous years, and as will soon become apparent, this fact together with the government's attitude are seriously criticised by the Commission. The Council of European Integration is used by the government as a one-way information forum, although the government is aware of the fact that the social partners have consolidated relations with European organisations and institutions and these relations could be useful in promoting Hungary's membership.<sup>12</sup> The Social Council forms the representation forum for those groups in society which require special protection or are in a disadvantaged position, such as the disabled, women, young people, or those threatened by social exclusion.

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<sup>12</sup> Ladó, Mária; Tóth, Ferenc: *Érdekegyeztetés helyett társadalmi párbeszéd* (2000) in: Magyarország politikai évkönyve, p.408.



The government is in a dominant position on both the Economic and the Labour Councils, with the exception of wages, the participants and the social partners do not have a veto, neither is their agreement required. Beyond the fundamental concern over the government's attitude towards the national level co-operation with the principal economic actors and the social partners, there is a further factor aggravating the situation. Although the institutional framework has been established, practice is not yet sufficiently strong and consolidated between the social partners to enable them to settle between themselves problems relating to the world of work. As stated earlier, sectoral collective agreements are weak and in such a situation both workers and employers want to negotiate directly with the government.<sup>13</sup>

The Commission's Report in 1999 did not criticise the new institutional arrangements on the social dialogue, although it noted that the number of trade unions and employers' organisations was too high to facilitate effective negotiations. The situation changed in 2000 and the Commission's Report points very critically to the government's lack of support. The Report states that social dialogue is not accorded the requisite importance and this situation needs to be addressed. There are some concerns over the results of the dialogue and the Report recommends that the government make additional efforts to ensure that real social dialogue is taking place and is followed up in an appropriate manner. There is a need to actively promote social dialogue within the country. The lack of effective consultation at national level is harmful to social dialogue, not only at European level, but also at decentralised level.<sup>14</sup>

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<sup>13</sup> It is understandable for the social partners to hold such a view when redistribution of budgetary resources is at stake. But when the issue becomes one of industrial relations, the government readily finds itself in the role of arbitrator, and whatever decision it reaches is bound to be unsatisfactory for one of the parties. (Herczog, László: *Az Érdekegyeztető Tanácstól az Országos Munkaügyi Tanácsig* (2000) in: Magyarország politikai évkönyve, p.420.)

<sup>14</sup> The Report adds that in particular the Economic Council is merely used by the government to transmit information to a wide range of representatives of society, including the social partners, with no opportunity for dialogue. (2000 Regular Report from the Commission on Hungary's Progress towards Accession pp.28; 79-82.)

With the reconstruction of the institutional framework for interest reconciliation at national level, the social partners have lost some of their important competences, and centralisation has become dominant. Yet further background information should be kept in mind. The previous nation-wide consensus regarding the transition to a market economy no longer exists. Interests have become polarised, some groups in society are winners in the process, whereas others have become losers and would need enhanced protection. As in any democratic system, governments in office cannot represent the interests of the whole society, they follow certain political and economic orientations to the detriment of some groups. One other remark to be noted is that the establishment of democratic institutions and the eventual consolidation of the organisational framework do not mean that full use is made of these institutions.<sup>15</sup> What is relevant is the human capacity, the ability to adapt to ever changing realities, the learning process of interest enforcement. Although the EU promotes the preparation of the social partners for membership by a variety of means, efficient representation occurs only with a long, organic, internal evolution.

#### Policy issues: labour market and poverty

In describing the structure of Hungarian society and its economy one sees some rather interesting and contradictory points. Those who can be considered as absolute winners of the transition process account for approximately 5-7% of the whole society. They possess roughly one third of all goods, are employed as top managers or have their own companies. At the other extreme, one third of the society is excluded from welfare and growth. They live under the poverty threshold, or while their everyday life is not threatened, they have no opportunity to obtain a higher standard of living.<sup>16</sup> In between are the remaining 60% or so who form the basis of economic growth.

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<sup>15</sup> Ágh, Attila: *Ten Years of Political and Social Reforms in Central Europe* (2001) 2 Central European Political Science Review No.3. p.31.

<sup>16</sup> Ferge, Zsuzsa: *Konzervatív szociálpolitika? A harmadik kormány első másfél éve* (2000) in: Magyarország politikai évkönyve, p.431.

With respect to the economic structure, it is true that the presence of multinational companies is significant, but they only account for the local share of a global economy: in the production sector investments of multinationals have been capital intensive, they employ relatively few workers, and with changing financial conditions, they do not hesitate to change location.<sup>17</sup> SMEs have a decent share of the national economy: there are about 750.000 SMEs in Hungary, which employ 70% of the workforce and generate 45% of the GDP.<sup>18</sup> SMEs experience poor access to finances and face complex and heavy administrative burdens. The government in office has taken various initiatives to promote this sector and those who belong to it: the "Széchenyi plan" aims to develop business culture and skills and to improve access to finance.

The tax and social policy of the present government is rather contradictory. Since 1998 the general tax burden on the middle class has diminished and those who belong to this group are the main beneficiaries of social assistance as well. To encourage child birth, the child care allowance<sup>19</sup> is based on previous salary, again benefitting those who can earn more. General child welfare support, available for all, stayed at the same nominal value for ages, alongside a rather high inflation rate. Though limited financial aid is available for the poorest, it depends on the discretion of authorities, whereas tax allowances are fixed.<sup>20</sup> At the lower end of the earning scale there is no 0% tax rate, and in general those living in poverty are unable to realise all the tax allowances available to those with children, as they do not earn enough to deduct the entire amount.<sup>21</sup>

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<sup>17</sup> Bogár, László: *Globális folyamatok és Magyarország -Esélyek és lehetőségek* (2000) in: Matolcsy, György (ed): *Növekedés és Globalizáció* pp.5-9. While the average tax burden on multinationals is about 8%, the average SME burden is about 17%. (1999 Regular Report from the Commission on Hungary's Progress towards Accession, under the heading: Ability to assume the obligations of membership, p.25.)

<sup>18</sup> This means that there are 128 undertakings per 1000 inhabitants, which is higher than the comparative EU figure (95). However, 99% of all enterprises are classified as SMEs, and most of them are micro-sized (family) companies. (1999 and 2000 Regular Reports from the Commission on Hungary's Progress towards Accession, under the headings: Economic criteria for membership, p.11; Ability to assume the obligations of membership, p.25. for year 1999; and p.43. for year 2000)

<sup>19</sup> Also with the aim of influencing demographic trends.

<sup>20</sup> Ferge, Zsuzsa: *Szociális jogok -szociális biztonság* (2000) 4 Fundamentum No.3. p.54.

<sup>21</sup> Ferge, Zsuzsa: *Elszabaduló egyenlőtlenségek* (2000) p.183.

Taking into consideration that one third of the society lives in poverty, it is highly debatable whether it was a wise decision to concentrate mainly on the middle class and to intervene at the lower end only as a final resort. On the one hand, one has to bear in mind that the middle class is that segment of the society which can induce economic growth based on domestic consumption, but on the other hand it is rather dangerous to forget about one third of the society, as there is a risk of creating a sharply and definitively divided society.<sup>22</sup> This choice is further contrasted to European policy choices: social initiatives are generally aimed at the lower segments of society, they adopt a preventive approach and aim to create an inclusive society.

Although the Hungarian administration does offer social assistance for the disadvantaged, the *criteria* at times are humiliating. The transformation of passive labour market policies into active ones serves to punish those in need: unemployment benefit is available for a shorter period of time compared to the previous regime; unemployment allowance depends on participation in public work, but the amount of the allowance is lower than the minimum income.<sup>23</sup> Special family allowances depend on the discretion of the authority, and the universal family allowance is unconditional until the 6th birthday of the child, after this date it is available only if the child regularly attends school. That is to say, those who cannot send their children to school, are deprived of this assistance. A large proportion of the Roma families fall into this category. One parent families are not given assistance either. Although the government emphasises and proves its commitment to combat demographic trends and to take families as a fundamental value, the tangible result is assistance directed to those who would not necessarily need it.

The Roma population requires special treatment; basically this entire minority belongs to the lower segment of society.<sup>24</sup> Their situation is particularly grave, close to being explosive. Since 1997, the Commission's Country Reports have regularly criticised this situation and urged the governments to take further steps towards protection and

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<sup>22</sup> Kiss, Róbert; Lévai, Katalin: *Variációk családpolitikai koncepciókra* (1999) 3 Fundamentum, No.4. p.104.

<sup>23</sup> Ferge, Zsuzsa: *A társadalom pereme és emberi méltóság* (2000) Esély p.46.

<sup>24</sup> The estimated number of the Roma population is between 400.000-600.000. The total population of Hungary is around 10million. (source: Hungarian Foreign Ministry)

promoting social inclusion, though the same Reports have recognised that governments have been aware of the situation and have taken initiatives. Romas are frequently the subject of attacks and discriminatory measures. Inequality of opportunity has to be reduced in relation to the standard of education, unemployment, life expectancy, although these factors can largely be explained by sociological factors as well.

In 1997 the government launched a comprehensive programme to improve the situation of the Roma population in general, aiming to improve education, employment, to promote activity in the agricultural sector, to improve health care, social protection and living conditions.<sup>25</sup> The successor government followed the principles of the comprehensive project and made available a more meaningful budget line to render the efforts more visible and hopefully successful. It is important to underline that these projects are intended to create the conditions to leave poverty and to encourage integration. The present government places special emphasis on the promotion of Roma children's education, with extended scholarships. However, these efforts bring about results only in the long run and only if they are carried out continuously and systematically.<sup>26</sup>

More should be said about Hungarian labour market trends. The employment rate is still considerably lower than the EU average (55.7%), though since 1998 the employment rate has been increasing. Unemployment has decreased, in 2000 it represented 6.5% of the workforce and some firms have recently reported skill shortages which can be described as a growth related problem. However, regional disparities remain significant and most of the unemployed are long-term unemployed or young people under

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<sup>25</sup> According to statistical data, life expectancy for the Roma is on average 10 years shorter than for the rest of the population, less than 46% completed primary school education and only 0.24% obtained a university degree. However, the birth rate among Romas is much higher than among the rest of the population, a fact which means that unless there is a major improvement, the disadvantage will be even greater. (source: Hungarian Central Statistical Office)

<sup>26</sup> It is easy to notice that meanwhile the government points on the improvement of Romas' situation, generally speaking does not pay particular attention to those who live in poverty. At times to define who belongs to the Roma population is not easy or unequivocal.

25 with low skills.<sup>27</sup> This trend has been underlined in all Commission Reports since 1997.

The low employment rate can be partly explained by the fact that the age at which citizens are eligible for the old age pension has only recently been increased (currently 62 years for both sexes), and when mass lay-offs took place older workers enjoyed priority with early retirement. Today older workers form the overwhelming majority of the long-term unemployed: there is almost an entire generation excluded from the labour market.<sup>28</sup> Those aged between 50-60, who grew up under a different economic model where work was guaranteed, are not capable of adapting to the new situation, they cannot compete for work, they cannot compete for themselves either; neither can they change their attitudes, which are based on the conviction that the state will resolve all problems and that they have no responsibility. And although the Commission welcomes the government's intention to reduce passive protection and enhance active measures: the group of excluded is too vulnerable and too numerous to be dealt with only from the point of view of the Employment Guidelines which offer remedies in different situations. Research findings show that this group of unemployed people cannot be seen as a labour reserve either, because of their skills or their age.<sup>29</sup> Those who are excluded from the labour market can participate in social activities only with great difficulty. For most people, the lack of independent resources means that wages are essential to enable participation in society - whether economically, culturally, politically, or educationally.<sup>30</sup>

Although Hungary is making arrangements to apply the Employment Guidelines, the period of pre-accession ought to be used to promote the preparation of those groups which are already in a critical situation or which will be particularly affected by accession and by further increased competition. Instead, tangible results of central intervention in the labour market can be seen in two directions: increased support for the middle class as

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<sup>27</sup> Data source: Commission Reports on Hungary

<sup>28</sup> Frey, Mária; Demkó, Olivér: *A hazai munkaerőpiac fejlődési trendjei* (2000) Munkaügyi Szemle No.10. p.30.

<sup>29</sup> Borbély, Tibor: *Quo vadis munkaügy?* (2000) Munkaügyi Szemle No.11. p.37.

<sup>30</sup> Dalminé Kiss, Gabriella: *A munkatársadalom válsága és a fiatalok életesélyei* (2000) Valóság No.11. p.39.

the basis of domestic economic growth and drastic transformation of passive measures into active ones, with the declared aim of reducing the large informal sector, but with the results that the most vulnerable groups are punished. These processes do not coincide with the fundamental aims of the European Employment Guidelines, in which solidarity and inclusion for all are underlying principles. In 1999, the government's medium-term employment development plan identified the most crucial points, such as increasing the employment rate, enhancing productivity, increasing supply in the labour market because of higher retirement age, enhancing the employment capacity of SMEs, and promoting social inclusion of the Roma population.<sup>31</sup> However, comprehensive concrete proposals which enact such priorities have not yet been published and it leads one to conclude that in the field of labour market policies, Hungary has to make serious efforts. These efforts have to be executed not only by the transposition of the "European Employment *acquis*", which itself is in evolution, but what is more important, vulnerable groups cannot be cast off as a forgotten and useless part of the society, not only because this approach is in fundamental contrast to European principles, but also because the shock suffered by these groups at the time of accession will be even heavier. These processes are damaging to the whole society and may threaten democratic achievements.<sup>32</sup>

Every government has to take fundamental decisions and in accordance with its priorities, it has to rank the values of the economic and social system. The present government chose to support the middle class to the detriment of solidarity and redistribution. The benefits and results of this choice have begun to show themselves. Yet one does not necessary have to agree with this point of view. First of all because those excluded from the preferential treatment are too numerous, and the victims of the drastic

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<sup>31</sup> Bagó, József: *A hazai foglalkoztatáspolitikai közelítése az európai normákhoz* (2000) Esély No.3. p.43.

<sup>32</sup> Bercusson, Brian; Deakin, Simon; Koistinen, Pertti; Kollonay Lehoczky, Csilla; Kravaritou, Yota; Mückenberger, Ulrich; Veneziani, Bruno; Vogel-Polsky, Eliane: *Manifesto for Social Europe 2000* (2000) pp.10-11. The Manifesto argues clearly that although political citizenship was established by the new governments in the CEEC, social citizenship was withdrawn. The authors point to the aim that Social Europe should make clear that enlargement includes not only the common market, but also the highly developed social dimension of the EU. The Charter of Fundamental Rights of the European Union adopted at the Nice Summit December 2000 also serves as a substantial reference point for the candidate countries. See: Wouters, Jan: *The EU Charter of Fundamental Rights -Some Reflections on its External Dimension* (2001) 8 Maastricht Journal of European and International Law pp.5-6.

economic changes cannot be simply ignored. A further issue is that the government's choice indicates an attitude to future developments which is in essential contradiction to European choices. The entire history of the Community social dimension illustrates that the priorities crystallised in the European Employment Strategy, employment and social inclusion, are results of a very long process. They point to those defects of the current capitalist system where public intervention is essential to preserve social peace. Would it not be better to forestall any such deviation from established values than to try to resolve it when it actually occurs?

#### Entering the EU: arguments *pro* and *contra*

The question is not whether Hungary wants to join the EU or not. One reason is that in the era of the globalisation small countries will not be able to find a way to compete successfully with integrated economies. Another reason is that since the beginning of the 1990s, Hungary has attracted such a quantity of foreign investment both from multinational and national companies and financial organisations, that the Hungarian economy *de facto* forms part of the international economic network. The point at stake now is institutional integration.

For the Union the actual situation is certainly more favourable than it will be after enlargement. It has obtained access to new markets even if with some limitations, but it did not have to share its structural policies. The Union can keep the countries knocking on the door under some political control, but it does not have to face directly the still fragile political balance within the Central European countries caused, for the most part, by minority problems. Enlargement, as was plain to see at the Nice Summit, will further exacerbate the institutional crisis of the Union. These points represent only a small indication of the problem obstructing and slowing down the enlargement process, and no word has been said about the hottest arguments such as those over agriculture policy, free



movement of persons or West-European public opinion, which is, at times, used instrumentally.<sup>33</sup>

The candidate countries are fully aware of these issues. Still, the arguments in favour of accession far exceed those against, and make it worthwhile to be persistent in the face of Community reluctance. In the field of social policy, entering the Union will mean a certain protection against social dumping. This statement might seem to be in strong contradiction with the research findings through the history of the Community social dimension. Even if the protection provided by European labour law is at the level of the lowest common denominator, it will protect Hungarian workers as much as other Community workers. True, this will increase labour costs: it is among the reasons why some EC norms, mainly in the field of workplace health and safety, are to be implemented only at the time of accession. At the same time, on the other side of the coin, it is possible that some labour-intensive industries will leave for countries which are not entering the Union in the immediate future. For the same reason Western European employers' lobbies do not fully support the enlargement process.

Lobbying and interest articulation will go through fundamental changes. The focus and the space for negotiations will widen. Alliances can be sought over a larger area and negotiating capacity can be enhanced. Accession will favour trade unions and the government *vis-a-vis* multinational companies and financial lobbies, which have up to now been in the position to enforce their interests. Trade unions' efforts will be supported by European and Member States' workers' organisations, the government together with other governments can achieve normative solutions at the European level which at the national level would fail. These changes in the scale of negotiating practice will positively influence national level social dialogue as well. The strengthening process at European level, in having recourse to the consensual way of decision-making instead of to the

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<sup>33</sup> Ágh notes that paradoxically as the accession capacity of the Central European countries has grown, so the absorption capacity of the EU has decreased to a great deal. (Ágh, Attila: *Ten Years of Political and Social Reforms in Central Europe* (2001) 2 Central European Political Science Review No.3 p.29.)

authoritative one, will enforce the position of the social partners at the national level *vis-a-vis* the government.

A further problem is the integration of the Roma population, a burden that Hungary alone cannot resolve. The statement is valid in regard to financial and political consequences. Social inclusion of the Roma, the substantial improvement of their educational and housing indicators requires such a long-term investment, which does not show tangible returns during one electoral cycle. In political terms it means that no government which hopes to remain in office can spend a large amount of financial resources without achieving results in four years. Furthermore, special attention devoted to the Roma population at the same time as a large part of the society is living below the poverty threshold, might give birth to disaffection and could seriously diminish government's popularity. After accession, it is very probable that Community financial means will be available to alleviate the problem. On the one hand, the support of ethnic minorities by direct and indirect channels would not amount to a new instrument of European policy making.<sup>34</sup> On the other hand, the fight against social exclusion in the framework of the European Employment Strategy will ensure that specific attention would be devoted to the Roma population.

It is difficult to envisage today how a Union of more than 20 Member States will look like. It is very probable that differences among the Member States will widen in terms of economic development and in terms of their approach to the intensity of European integration. Recourse to enhanced co-operation will be more frequent and it might easily happen that the EU will be composed of concentric Communities: centre and periphery. Those Member States in the centre will constitute the core of the integration process with common economic, foreign and internal policies, with the periphery participating in only some policies. The dividing line will not necessarily be the one which is the Union's current external border, since the EU of 15 also shows considerable

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<sup>34</sup> De Witte, Bruno: *Politics Versus Law in the EU's Approach to Ethnic Minorities* (2000) EUI WP RSC No.4. pp.17-20; Amato, Giuliano (Rapporteur: Judy Batt): *Minority Rights and the EU Enlargement to the East* (1998) EUI WP RSC No.5. pp.13-15.

differences both in economic and policy terms. In such a situation, it is arguable that the applicant countries could re-establish among themselves a historically strong economic and political co-operation. This network can constitute, even if only partially, an alternative integration process; but its main use could be to form a regional block for co-ordinated interest enforcement when Community decisions are at stake.

A final remark should relate to the human component of the accession process, which is rarely taken into consideration. People living in the applicant countries have had to re-evaluate their own society, social relations and their role, and more recently they have had to recognise that the EU is not only that fairy tale of high standards of living that it appeared to be from behind the iron curtain, but that it requires serious sacrifices. In a more competitive society and economy, Eastern Europeans have lost the last residue of a romantic vision, and they know that, beyond the transposition of the *acquis*, they can fully enter the Union only if they are able to adapt to Western societies. In the era of a paternalistic state where an individual's choices over how to lead one's life were limited, citizens created a community against the common ideological enemy. After the political-economic changes, former allies suddenly became competing members. It led to alienation, at times to frustration. Central-Europeans have started to discover only very slowly that they live in a society where choices are no longer limited, but risks are also increased, and the individual is responsible for his/her life. Yet not everybody is capable of adapting to such drastic changes. Basically an entire generation is affected and they cannot be abandoned, since the society and economy which the candidate countries aim to construct follow a social model based on mutually shared values such as social welfare and solidarity. There is an urgent need to reconstruct social cohesion and to strengthen the role of civil society. This is an immediate challenge and a response has to be given before enlargement can take place.



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## TABLE OF CONTENTS

<b>Preface</b>	<b>1</b>
 <b>Chapter I</b>	
<b>The foundation of the social dimension</b>	<b>5</b>
• An unfortunate case: search for definition	6
• An attempt to identify the intentions of the founding fathers: the Rome Treaty	12
• The free movement provisions	15
• Establishing the common market: social security for migrant workers	18
• The European Social Fund: an objective of social policy or an incentive for economic integration?	23
• Social provisions	26
• Prospects for European social policies	31
 <b>Chapter II</b>	
<b>Community policies to play a role in the social field</b>	<b>35</b>
• Political and economic climate at the end of the 1960s	36
• The Paris Summit: "...attached as much importance to vigorous action in the social field as to the achievement of the economic and monetary union ..."	39
• The establishment of the European Regional Development Fund	47
• The enlarged role of the European Social Fund	51
• The involvement of the social partners	55
 <b>Chapter III</b>	
<b>The Single European Act</b>	
<b>"Sur la dimension sociale, nous sommes en plein malentendu"</b>	<b>61</b>
• The path to the Single European Act	64
• Articles 118/a and 118/b	68



**Chapter VI****Conclusions: what an applicant country has to face. The case of Hungary** 177

- Legislative issues: transposition of the *acquis communautaires* 178
- The functioning of the social dialogue 180
- Policy issues: labour market and poverty 184
- Entering the EU: arguments *pro* and *contra* 190

**Bibliography** 195











